FILE COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1960

No. 87

TAMPA ELECTRIC COMPANY, PETITIONER,

v.

NASHVILLE COAL COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 12, 1960

CERTIORARI GRANTED JUNE 27, 1960

SUPREME COURT OF THE UNITED STATES

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[fol. A] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 13,775

TAMPA ELECTRIC COMPANY, Appellant,

—v.—

NASHVILLE COAL COMPANY, NASHVILLE COAL, INC. and WEST KENTUCKY COAL COMPANY, Respondents.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

Appendix to Appellant's Brief—Filed January 15, 1959

[fol. 1]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
Nashville Division

Civil Action No. 2418

TAMPA ELECTRIC COMPANY, Plaintiff,

—v.—

NASHVILLE COAL COMPANY, NASHVILLE COAL, INC. and WEST KENTUCKY COAL COMPANY, Defendants.

DOCKET ENTRIES

9- 3-57 Complaint filed, with attached "Exhibit A"; and Affidavit filed.

9- 4-57 Summons issued: Two copies of summons & one copy of Complaint & Exhibit to be served on Hooper Love, statutory agent for deft., West Kentucky Coal Company. Two copies of summons & one copy of Complaint & Exhibit to be served on John J. Teague, statutory agent for deft., Nashville Coal Company, Inc. Original & two copies of Summons (One copy certified), Certified copy of Complaint & Exhibit, original of Affidavit, attested copy of Court Order of 9-4-57, Atty. Keeble's $2.00 Check payable to Sec. State, to be served on Secretary of State [fol. 2] of Tennessee for deft., Nashville Coal Company. (All above listed proceedings delivered to U. S. Marshal).

9- 4-57 Order entered, directing and setting the time within which the defendant Nashville Coal Co. shall file its defense.

9- 6-57 Summons for Nashville Coal, Inc., returned executed and filed. MFE $2.00.

9- 6-57, Summons for Nashville Coal Co. returned by U. S. Marshal showing service made on Secretary of State. MFE $2.00. (Rct. for $2.00 for Sec. State attached)

9- 6-57 Summons for West Kentucky Coal Co. returned executed and filed. MFE $2.50.

9-10-57 Summons for Nashville Coal Co. with Sec. of State's Return, with certification of service, upon Nashville Coal Co., c/o Mark E. Eastin, Jr. West Ky. Coal Co., Madisonville, Ky., along with affidavit of Sec. State and Registered Receipt Card,—filed.

9-20-57 Order entered directing the defendants' time be extended to and including to & including Oct. 7, 1957, to file its defense.

10- 7-57 *Answer of the Defendants, filed, (with attached exhibit "1") (Certificate of Service attached.)

4-25-58 Motion filed by plaintiff to put cause on Pretrial Docket, and

4-25-58 Grounds (brief) for plaintiff's Motion to place the above cause on Pretrial, with letter of service.

5-13-58 *Order entered, placing this cause on the Pretrial Docket. (Attested copy of same mailed to all counsel of record)

[fol. 3]

6- 6-58 *Defendants' Motion for Summary Judgment, & Affidavit of R. R. Kramer with attached Exhibit—A;—filed. (Certificate of Service attached)

6- 6-58 *Defendants' Memorandum of Points and Authorities in Support of Motion for Summary Judgment,—filed. (Certificate of Service attached)

7-11-58 Notice of Cross-Motion filed by Plaintiff's, certificate of service attached.

7-11-58 Plaintiff's Cross-Motion for Summary Judgment filed, certificate of service attached.

7-11-58 Affidavit of William C. MacInnes, exhibit "A" attached.

7-11-58 Memorandum of points and authorities in support of Plaintiff's Cross Motion for summary judgment and in opposition to defendant's motion for summary judgment.

7-30-58 Defendant's Reply Memorandum on the Motion and Cross-Motion for Summary Judgment, filed.

8-11-58 Transcript of a Portion of the Proceedings, before the Court, on Motions, on July 31, 1958,—filed. (Ribbon copy to Atty. Sims)

8-11-58 Transcript of the Proceedings, on Motions before the Court, on July 31, 1958,—filed. (Ribbon Copy & carbon copy to Atty. Keeble)

8-13-58 Plaintiff's Reply Memorandum on the Motion and Cross-Motion for Summary Judgment, with certificate of service attached,—filed.

8-13-58 Supplementary Affidavit of Charles H. Schwaner, with certificate of service attached,—filed.

[fol. 4]

8-14-58 Defendants' Supplemental Reply Memorandum, —filed.

9-25-58 O. C. R.'s Stenotype notes filed of motion heard before Judge Wm. E. Miller July 31, 1958.

11-18-58 *Opinion of the Court—entered. Defendant's Motion for a Summary Judgment should be sustained and the Plaintiff's similar Motion overruled (Attested copy of Opinion mailed to all counsel of record)

12- 4-58 *Order of Final Judgment, entered. Ordering that: (1) The Contract of May 23, 1955, as supplemented & amended between Pltf. & the Defts. is in violation of Sec. 3 of the Clayton Act, 15 U. S. C. Sec. 14, (2) By reason of aforesaid violation of the Clayton Act, said contract is

illegal, void and unenforceable. (3) Plaintiff has no cause of action and is entitled to no relief, against any or all of the defendants on account of the repudiation of said contract, etc. (4) Plaintiff's complaint for declaratory judgment and this action be & they are hereby finally dismissed on the merits and with prejudice. (5) Defendants are entitled to have and recover from plaintiff their costs in this action & to have execution therefor. (Order signed by all counsel of record and photostatic copy of Order mailed to all counsel of record)

12-15-58 *Notice of Appeal—filed by the Plaintiff, Tampa Electric Co. (Certificate of Service attached.)

12-15-58 *Bond for Costs on Appeal—filed by the Plaintiff, Tampa Electric Company.

12-16-58 Record on Appeal forwarded to U. S. Court of Appeals for the Sixth Circuit, Cincinnati, Ohio

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[fol. 5]

IN UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF TENNESSEE

NASHVILLE DIVISION

[Title omitted]

COMPLAINT—Filed September 3, 1957

1. This is an action for a declaratory judgment, pursuant to Section 2201 of Title 28 of the United States Code, and is brought because there is an actual controversy now existing between the parties to the above entitled action as to which the plaintiff seeks the judgment of this Court.

2. Plaintiff is a corporation organized and existing under the laws of Florida.

3. Defendant, Nashville Coal Company, was organized under the laws of Tennessee in June 1936.

4. On June 18, 1956, its sole stockholder, defendant Nashville Coal Inc., voted to surrender the Nashville Coal Company's charter and dissolve said corporation. The certificate of dissolution, to be effective as of June 30, 1956, was forwarded to the Tennessee Secretary of State on June 23, 1956 and recorded on December 14, 1956.

[fol. 6] 5. Defendant, Nashville Coal Inc. is a corporation organized and existing under the laws of Kentucky, is duly qualified to do business in Tennessee, is the sole stockholder of defendant Nashville Coal Company and received by conveyance all of the real and personal property of Nashville Coal Company subsequent to the latter's dissolution.

6. Defendant, West Kentucky Coal Company, is a corporation organized and existing under the laws of New Jersey and is duly qualified to do business in Tennessee.

7. The matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000.

8. Plaintiff is engaged in the business of producing and selling electric energy in and about the City of Tampa, Florida. On or about the 23rd day of May, 1955, plaintiff and a partnership known as Potter Towing Company, composed of David K. Wilson and Justin Potter, entered into a contract providing for the sale and delivery to plaintiff of all of the coal required by plaintiff for the production of electric energy at a new plant it was constructing near Tampa, Florida, for a period of 20 years upon terms and conditions set forth in the said contract, a copy of which is annexed hereto and marked Exhibit "A".

9. Thereafter, said David K. Wilson and Justin Potter assigned or otherwise transferred said contract to Potter Towing Company, Inc., a corporation organized under the laws of Tennessee, and thereafter, said Potter Towing Company, Inc. merged with Nashville Coal Company, one of the defendants herein, and said Nashville Coal Company assumed all the rights and obligations of Potter Towing [fol. 7] Company, a partnership, and Potter Towing Company, Inc., a corporation, under said contract.

10. On or about the 21st day of September, 1955, the defendant, West Kentucky Coal Company, guaranteed plaintiff in writing against any loss or damage arising out of non-performance of said contract dated May 23, 1955. A copy of said agreement of guaranty is annexed hereto and marked Exhibit "B".

11. On or about the 8th day of February, 1956, said agreement dated May 23, 1955 was amended. A copy of said amendment is annexed hereto and marked Exhibit "C".

12. Under the terms of said contract, dated May 23, 1955, it was provided that the defendant would begin making deliveries of coal in or about March 1957.

13. Defendant, Nashville Coal Company, has failed and refused to deliver any coal under said contract but, on the contrary, has repudiated the same, and has asserted that said contract is invalid and unlawful on the ground that the said contract is violative of Section 3 of the Clayton, Act, 38 Stat. 731; USC Title 15, Sec. 14.

14. Plaintiff contends that said contract is in all respects valid and lawful.

Wherefore, plaintiff prays judgment declaring:

1. That said contract dated May 23, 1955 is a valid, lawful and enforceable contract and is binding upon the plaintiff and defendants, according to its terms.

2. That such further relief against the above named defendants, or any of them, based on such declaratory [fol. 8] judgment, as may be necessary or proper, be granted plaintiff after reasonable notice and hearing.

3. That plaintiff recover the costs of this action.

Hooker, Keeble, Dodson & Harris, By S/ David M. Keeble, A Member of the Firm, Attorneys for Tampa Electric Company, Office and Post Office Address, 1106 Nashville Trust Building, Nashville 3, Tennessee.

Filed: Sept. 3, 1957.

[fol. 9] EXHIBIT A ANNEXED TO COMPLAINT

THIS AGREEMENT, made and entered into this 23rd day of May, 1955 by and between POTTER TOWING COMPANY, a Tennessee partnership of David K. Wilson and Justin Potter (Hereinafter called "Seller") and the TAMPA ELECTRIC COMPANY (Hereinafter called "Buyer") a corporation organized and existing under and by virtue of the laws of the State of Florida.

WITNESSETH THAT:

WHEREAS, Seller proposes to make available for sale to Buyer large quantities of coal from the West Kentucky field near Uniontown, Kentucky, or its equivalent: Equivalent quality means equally satisfactory for the use of TAMPA ELECTRIC COMPANY.

WHEREAS, Buyer desires to purchase certain coal for use in its plant to be constructed near Tampa, upon the terms and conditions hereinafter set forth:

NOW, THEREFORE, in consideration of the premises and the covenants and agreements hereinafter contained, it is agreed between Buyer and Seller as follows:

ARTICLE 1—Quantities

Seller agrees to provide and deliver on the dock or docks of the Buyer at Plant Gannon coal to supply the total requirements of fuel of the Buyer for the operation of its first two units to be installed at the Gannon Station and the Buyer agrees to accept and pay for such fuel as provided in Article 4 hereof, which fuel requirements shall be not less than 225,000 tons of coal per unit per year. It is further agreed that if during the first 10 years of the term of this contract the Buyer constructs addi-
[fol. 10] tional units in which coal is used as the fuel, it shall give the Seller notice thereof two years prior to the completion of such unit or units and upon completion of same the fuel requirements thereof shall be added to this contract and be furnished by the Seller and accepted by the Buyer. It is understood that the Buyer has the option to be

exercised two years prior to completion of said unit or units of determining whether coal or some other fuel shall be used in same. It is anticipated that deliveries will start approximately March, 1957 for the requirements of the first unit and that deliveries for the requirements of Unit #2 will begin when constructed. The size of the coal delivered hereunder shall be washed 3" x 0 or smaller.

Notwithstanding the above, Buyer at its option and upon six (6) months' notice to Seller of its intention so to do, may reduce the quantity of coal it will accept from the Seller by fifteen percent provided such reductions are occasioned by the desire of the Buyer to use some by-product as a fuel which would be supplied by some local customer of the Buyer.

ARTICLE 2—Quality

Seller hereby represents that the washed coal 3" x 0 or smaller to be furnished to the Buyer shall have a B.T.U. content of 11,800 as received at the point of sampling and analyzing. The Bureau of Mine procedure for sampling and analyzing shall be adopted as the standard procedure for sampling and analyzing under the terms of this agreement and in the event of a change in this system during the term of this agreement, the standard procedure for analyzing and sampling shall change accordingly.

[fol. 11] It is agreed that the quality of the coal delivered hereunder may vary by one and one-half percent up or down from 11,800 B.T.U. It is further agreed that the Buyer shall sample and analyze all deliveries hereunder and if the coal sampled and analyzed is more or less than one and one-half percent above or below 11,800 B.T.U.'s as received, the price shall be adjusted accordingly, ie. In the event the quality of the coal delivered is less than 11,623 or more than 11,977 B.T.U.'s as received, the price shall be adjusted on the basis of the number of B.T.U.'s per pound. The starting point for reductions in price shall be 11,623 B.T.U.'s as received and the starting point for a bonus shall be 11,977 B.T.U.'s as received.

At any time Seller may request that a reputable independent commercial laboratory agreeable to both parties

be employed to verify sampling and analyzing of the coal delivered hereunder. In the event the determinations of the independent laboratory chosen are within ¾ of 1 percent of the determinations of the analyses of the Buyer, the Seller shall pay the charges for the services rendered by the independent laboratory. In the event the determinations of the independent laboratory vary by more than ¾ of 1 percent from the determinations made by the Buyer, then the Buyer shall pay for the service rendered by the independent laboratory. When secured the analysis of the independent laboratory shall govern settlements between the parties.

ARTICLE 3—Delivery, shipments and weights.

Shipments of coal shall be made in approximately equal monthly amounts to correspond with annual requirements of Buyer. Seller agrees to keep a minimum [fol. 12] of 40,000 to 50,000 tons of coal in storage or transit for the protection of the Buyer. All coal shall be delivered and title thereto shall pass to the Buyer, on Buyer's dock. Seller having full control and complete responsibility for all transportation from mine to delivery point.

Payment for coal delivered hereunder shall be based on destination weights and these weights shall be determined by water displacement of barge or barges. The Seller shall have the right to check such deliveries and in the event of a discrepancy an average of the weights determined by the Buyer and the Seller shall be used as the correct weight for invoicing purposes. The ton of coal as used in this agreement means 2,000 pounds.

Buyer is to maintain proper and adequate dock facility and proper channel depth at all times and to promptly remove coal from docks so as not to delay Seller's unloading.

ARTICLE 4—Price

Buyer will pay to Seller for all coal delivered hereunder at the unloading point of the Seller at Plant Gannon a base price of $6.85 per ton. Seller agrees to credit Buyer with 45¢ for each ton of return cargo acceptable to the

Seller and obtained by it for transportation from Tampa Bay to destination more than one half of the distance by water to Uniontown, Kentucky, up to the number of tons of coal delivered by Seller to Buyer.

Seller agrees and guarantees that Buyer shall receive a minimum credit of 30¢ per ton at all times. However, a full credit of 45¢ per ton shall be guaranteed for eighteen months beginning at time of first delivery or until Unit #2 is installed, whichever date is earlier.

[fol. 13] (A) Escallation

For the first five years of this agreement the base price for purposes of escallation shall be $6.85 per ton. No escallation shall apply between May 23, 1955 and the time of the start of the contract in 1957. Escallation shall be on labor and supplies only. 40% of the price shall constitute cost of labor. 17% of the price shall constitute cost of materials and supplies. All escallation shall be based on the average weekly gross earnings of production workers in manufacturing industry in current dollars as published in the Monthly Labor Review of U. S. Department of Labor, Table C 3. The actual index base shall be the index as of the month in which first deliveries are made in 1957. The price of coal delivered hereunder will vary up or down 57/100 of 1% for each 1% change in the above index.

For purposes of escallation, the determinations shall be made quarterly beginning the first of the quarter following the month in which first deliveries are made. The price determined at any period after adjustment for escallation shall be the price which shall be used for the ensuing three month period.

It is agreed that the total effect of escallation shall not exceed 32¢ per ton in each of the four consecutive five year periods except that in the event of war the effect of escallation shall not be limited. At the end of each five year period the price in ef- [fol. 14] fect, ie, the base price plus or minus adjustment, for escallation shall be the agreed base price for purposes of escallation for the ensuing five year term.

(B) Taxes

Transportation or Toll Tax if applicable shall be added to the price. If, after the date of first deliveries, any new or special taxes not now contemplated are added, then the price is to be adjusted accordingly. This will not include income taxes, excess profit taxes, property tax or capital stock franchise.

ARTICLE 5—Billing

Seller shall bill the Buyer not later than the 10th day and Buyer shall pay said billing not later than the 20th day of each month for coal delivered hereunder during the preceding calendar month.

ARTICLE 6—Force Majeure

If because of force majeure either party hereto is unable to carry out any of its obligations under this agreement, and if such party promptly gives to the other party hereto notice of such force majeure, then the obligations of the party giving such notice shall be suspended to the extent made necessary by such force majeure and during its continuance, provided the effect of such force majeure is eliminated insofar as possible with all reasonable dispatch. Any deficiencies in deliveries of coal hereunder caused by force majeure shall not be made up except by mutual consent.

[fol. 15] The term "force majeure" as used herein shall mean any causes beyond the control of the party affected thereby, such as acts of God, acts of the public enemy, insurrections, riots, strikes, labor disputes, labor or material shortages, fires, explosions, floods, breakdowns of or damage to plants, equipment or facilities, accidents of navigation, faults in the coal seams, interruptions to transportation, river freeze-ups, embargoes, orders or acts of civil or military authority, or other causes of a similar nature including scheduled outages for inspections and/or maintenance which wholly or party prevent the mining, delivering and/or loading of the coal by the producer thereof or by Seller, or the receiving, transporting and/or delivering of the coal by the carrier of the coal, or the accepting, utilizing and/or unloading of the coal by Purchaser.

ARTICLE 7—Arbitration

Any controversy or claim arising out of or relating to this contract, or breach of this contract, shall be settled by arbitration, in accordance with the rules, then prevailing, of the American Arbitration Association, and judgment upon the award rendered may be entered in any court having jurisdiction thereof.

ARTICLE 8—Term

The term of this agreement shall be for a period of twenty years from the first day of the month in which month first deliveries are made to the Buyer.

ARTICLE 9—Adjustment for Gross Inequities

Any gross inequity that may result from unusual economic conditions not contemplated by the parties at the [fol. 16] time of execution of this contract may be corrected by mutual agreement or arbitration; provided, however, that nothing contained herein shall be construed as relieving seller from the obligation to continue the delivery of coal and the Buyer to receive and pay for coal as provided under this contract, notwithstanding the existence of a claim of inequity or the failure of the parties to reach an agreement with respect thereto. Each party shall in case of a claim of gross inequity furnish the other with whatever documentary evidence may be requested in effecting such settlement.

This agreement is made in good faith by both parties under the present laws and contemplates the possibility of changes in present laws and therefore the possibilities of adjustments that will have to be made to conform with future changes in the law at which time both parties will negotiate in good faith to adjust as necessary.

TAMPA ELECTRIC COMPANY

By W. C. MACINNES
President

Attest:

C. H. SCHWANER
Secretary

POTTER TOWING COMPANY

By JUSTIN POTTER
Partner

Witness:

JOE DAVIS

[fol. 17] The undersigned, Uniontown Coal Mining Company, a Kentucky corporation and Nashville Coal Company, Inc., a Tennessee corporation, in consideration of benefits resulting to each of them by reason of the execution and the performance of the above contract hereby unconditionally guarantee performance of said contract by Potter Towing Company.

IN TESTIMONY WHEREOF the undersigned have caused their respective corporate names and seals to be hereto affixed by their duly elected officers on this the 23rd day of May, 1955.

UNIONTOWN COAL MINING COMPANY

By JUSTIN POTTER
Chairman of the Board

Attest:

FRED S. HAMILTON
Secretary

NASHVILLE COAL COMPANY, INC.

By JUSTIN POTTER
President

Attest:

STUART KNIGHTLY
Secretary

[fol. 18] EXHIBIT B ANNEXED TO COMPLAINT

SUPPLEMENT TO AN AGREEMENT DATED MAY 23, 1955 BETWEEN POTTER TOWING COMPANY, A TENNESSEE PARTNERSHIP OF DAVID K. WILSON AND JUSTIN POTTER, CALLED "SELLER" AND THE TAMPA ELECTRIC COMPANY, A FLORIDA CORPORATION, CALLED "BUYER"

WHEREAS, an agreement dated May 23, 1955 by and between Potter Towing Company, a Tennessee partnership of David K. Wilson and Justin Potter, called "Seller", and Tampa Electric Company, called "Buyer", created certain rights and obligations with respect to the sale of coal; and the rights and obligations of the Seller thereto have been transferred to Nashville Coal Company, a Tennessee corporation, as a result of the transfer of said contract from Potter Towing Company, a partnership, to Potter Towing Company, Inc., a Tennessee corporation, and the subsequent merger of said Potter Towing Company, Inc. into said Nashville Coal Company; and

WHEREAS, West Kentucky Coal Company (the wholly owned subsidiary of which, Nashville Coal, Inc., is now the sole owner of the entire capital stock of Nashville Coal Company) has agreed to protect and indemnify Justin Potter and David K. Wilson from any loss or damage arising out of non-performance of said agreement with Tampa Electric Company; and it is desired to make such guarantee a direct obligation to Tampa Electric Company and thus, all parties consenting, to eliminate Justin Potter and David K. Wilson from rights or obligations in the premises.

NOW, THEREFORE, IT IS AGREED:

1. Justin Potter and David K. Wilson shall be relieved of any liability or obligation to Tampa Electric Company [fol. 19] resulting from non-performance of said agreement dated May 23, 1955 with Tampa Electric Company on and after October 1, 1955.

2. On and after October 1, 1955, West Kentucky Coal Company, a New Jersey corporation, shall be liable for any loss or damage to Tampa Electric Company arising

out of non-performance of said coal contract between Potter Towing Company and Tampa Electric Company dated May 23, 1955.

EXECUTED in triplicate this 21st day of September 1955.

JUSTIN POTTER
Justin Potter
DAVID K. WILSON
David K. Wilson
Former partners d/b/a
Potter Towing Company

WEST KENTUCKY COAL COMPANY

By HOOPER LOVE
President

Attest:

U. W. POWELL
Secretary

TAMPA ELECTRIC COMPANY

By W. C. MACINNES
President

Attest:

C. H. SCHWANER
Secretary

[fol. 20] STATE OF KENTUCKY
COUNTY OF UNION

Personally appeared before me DARYL F. BATES, a Notary Public in and for said County and State, the within named Justin Potter and David K. Wilson, with whom I am personally acquainted, and who acknowledged that they executed the within instrument for the purposes therein contained.

WITNESS my hand and official seal at Uniontown, Kentucky, this 21st day of September 1955.

DARYL F. BATES
Notary Public
My commission expires: July 1, 1957

STATE OF KENTUCKY
COUNTY OF HOPKINS

Before me, ETHELYN O'NEAL, a Notary Public within and for the State and County aforesaid, personally appeared Hooper Love and Urey W. Powell, with whom I am personally acquainted and who upon their several oaths acknowledged themselves to be the President and Secretary respectively of West Kentucky Coal Company, a corporation, and that they as such President and Secretary, being authorized so to do, executed the foregoing instrument for the purpose therein contained by signing the name of the corporation by the said Hooper Love as such President and attesting the same by the said Urey W. Powell as such Secretary.

WITNESS my hand and official seal at office at Madisonville, Kentucky, on this the 21st day of September 1955.

ETHELYN O'NEAL

.....
Notary Public

[fol. 21] STATE OF FLORIDA
COUNTY OF HILLSBOROUGH

Before me, G. B. HENDERSON, a Notary Public within and for the State and County aforesaid, personally appeared W. C. MacInnes, and C. H. Schwaner, with whom I am personally acquainted and who upon their several oaths acknowledged themselves to be the President and Secretary respectively of Tampa Electric Company, a corporation, and that they as such President and Secretary, being authorized so to do, executed the foregoing instrument for the purpose therein contained, by signing the name of the corporation by the said W. C. MacInnes as such President and attesting the same by the said C. H. Schwaner as such Secretary.

WITNESS my hand and official seal at office at Tampa, Florida, on this the 27th day of September 1955.

G. B. HENDERSON
Notary Public
My commission expires:
Notary Public State of Florida at Large
My commission expires Oct. 19, 1957

[fol. 22] EXHIBIT C ANNEXED TO COMPLAINT

THIS AGREEMENT of amendment of contract made and entered into on this, the 8th day of February, 1956, by and between NASHVILLE COAL COMPANY, party of the first part, hereinafter called the "Seller" and TAMPA ELECTRIC COMPANY, party of the second part, hereinafter called the "Buyer".

WITNESSETH: that

WHEREAS, Potter Towing Company and Tampa Electric Company entered into a certain coal sale contract and agreement dated May 23, 1955, and

WHEREAS, Potter Towing Company assigned said coal sale contract and agreement dated May 23, 1955, together with all of its rights, titles and obligations arising thereunder and incident thereto to Nashville Coal Company, all with the consent and agreement of Tampa Electric Company, and

WHEREAS, a mutually satisfactory arrangement has been agreed upon between the Seller and the Buyer affecting the obligations of each relative to the construction and furnishing of all necessary dock and facilities, including unloading facilities to be placed at Black Point, Plant Gannon site at Tampa, Florida, by both the Buyer and the Seller; and

WHEREAS, the parties do desire to amend and incorporate into said original agreement of May 23, 1955, the following terms and provisions as agreed upon between them;

NOW THEREFORE, in consideration of the premises and covenants and agreements hereinafter contained, the parties do contract and agree as follows:

[fol. 23] 1. The Buyer agrees to construct from the bottom of the bay all necessary mooring facilities, dolphins, platforms, and a dock to the length of 450 feet and support structures therefor, up to but not including the rails upon which the Seller's unloading tower or towers will be placed, also including all necessary access ways thereto, and to rent the same to the Seller for its exclusive use and con-

trol for the contract period at an annual rental or charge equal to 18% of actual initial construction cost, less the sum of $160,000. Said rental to be paid by the Seller to the Buyer quarterly beginning with the date of first delivery of coal hereunder by the Seller, but not in advance quarterly.

2. The Seller agrees at the termination of the contract period to return said facility to the Buyer in as good a condition as received, ordinary wear and tear excepted; to maintain said facility and protect and indemnify the Buyer against any and all claims, losses or liabilities suffered by Buyer, if any, occasioned by Seller's use of said facility, except those resulting or occasioned by the negligence of the Buyer, its agents, servants, or employees.

3. The Seller agrees to construct at its own expense upon such dock facility described in number 1 above all necessary equipment to unload and convey its coal product to the east end of said dock facility and recognizes that this amendment to no extent relieves Seller of its obligations to unload and deliver coal as provided in said original contract of May 23, 1955, provided, however, that at the expiration of the contract period Seller will be and is authorized to remove its said towers, conveyors and other equipment from said dock facility.

[fol. 24] Except as hereinabove amended, said original agreement of May 23, 1955, remains in full force and effect as to all of its terms and provisions as written.

In Testimony Whereof, the parties have hereunto caused their corporate names and seals to be subscribed and affixed by their duly authorized officers on this, the day and date first above written.

Nashville Coal Company

By Mark E. Eastin Jr.

Attest:

U. W. Powell

Tampa Electric Company

By W. C. MacInnes
President

Attest:

C. H. Schwaner
Secretary

[fol. 25]

IN UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF TENNESSEE

NASHVILLE DIVISION

[Title omitted]

ANSWER—Filed October 10, 1957

Defendants, by their attorneys, answer the complaint herein as follows:

1. Aver that paragraph 1 states only legal conclusions which do not require answer.

2. Admit the allegations of paragraph 2.

3. Admit the allegations of paragraph 3.

4. Admit the allegations of paragraph 4.

5. Admit that Nashville Coal Company, Inc. is a corporation organized and existing under the laws of Kentucky, is duly qualified to do business in Tennessee, and was the sole stockholder of Nashville Coal Company, now dissolved; aver that upon and subsequent to the dissolution, substantially all of the latter's property was transferred to Nashville Coal, Inc.

6. Admit the allegations of paragraph 6.

7. Admit the allegations of paragraph 7.

[fol. 26] 8. Admit the allegations of paragraph 8, but deny that Exhibit A to the complaint effected a lawful, binding or enforceable contract.

9. Admit the allegations of Paragraph 9, but refer to an agreement of merger executed September 10, 1955, particularly Article II, Section 2 thereof, for a statement of the resulting rights and obligations of Nashville Coal Company. A true copy of Article II, Section 2 of the aforementioned agreement of merger is attached hereto as Exhibit 1.

10. Admit that on or about the 21st day of September 1955, West Kentucky Coal Company executed the docu-

ment attached as Exhibit B to the complaint, refer to the terms thereof for a statement of its legal effect, and deny that West Kentucky Coal Company is thereby subjected to any liability to plaintiff.

11. Admit that on or about the 8th day of February 1956, the alleged contract, attached as Exhibit A to the complaint, was purportedly amended by the document attached as Exhibit C to the complaint.

12. Refer to the complete text of the alleged contract for a statement of provisions thereof and otherwise deny the allegations of paragraph 12.

13. Admit that the trustees in dissolution of Nashville Coal Company have refused to deliver any coal under the terms of the alleged contract, attached as Exhibit A to the complaint, and that they and Nashville Coal Company, Inc. and West Kentucky Coal Company have asserted and now assert that the same is invalid and unlawful, on the ground that it violates Section 3 of the Clayton Act. Defendants further assert that the alleged contract is illegal, void and unenforceable in that it con- [fol. 27] travenes Sections 1 and 2 of the Sherman Act, 26 Stat. 209, 50 Stat. 693, 15 U. S. C. Secs. 1, 2; Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, 38 Stat. 730, as amended 49 Stat. 1526, 15 U. S. C. Sec. 13; and Section 3 of the Robinson-Patman Act, 49 Stat. 1528, 15 U. S. C. Sec. 13a.

14. Deny that the contract is lawful or valid in fact or in law.

15. Deny each and every allegation of the complaint not otherwise admitted, denied, controverted or qualified.

First Affirmative Defense

The complaint fails to state a claim upon which relief can be granted.

Second Affirmative Defense

The alleged contract, attached as Exhibit A to the complaint, is illegal, void, and unenforceable by or against

either party, in that, contrary to Sections 1 and 2 of the Sherman Act, 26 Stat. 209, 50 Stat. 693, 15 U. S. C. Secs. 1, 2; and Section 3 of the Clayton Act, 38 Stat. 731, 15 U. S. C. Sec. 14, it necessitates the vendee's purchase of its entire coal requirements for a period of twenty years, amounting to hundreds of thousands of tons and millions of dollars per year, from one single seller to the exclusion of all competing sellers.

THIRD AFFIRMATIVE DEFENSE

The alleged contract is illegal, void, and unenforceable by or against either party, in that performance according to its terms, and particularly Article 4 entitled "Price", would violate the provisions of Section 2 of the Clayton [fol. 28] Act, as amended by the Robinson-Patman Act, 38 Stat. 730, as amended 49 Stat. 1526, 15 U. S. C. Sec. 13, and Section 3 of the Robinson-Patman Act, 49 Stat. 1528, 15 U. S. C. Sec. 13a.

FOURTH AFFIRMATIVE DEFENSE

The action is based on an agreement violative of the Antitrust Laws of the United States and has as its object and effect the accomplishment of illegal ends which would be consummated by the judgment sought.

Wherefore, defendants pray that judgment be entered dismissing the complaint with prejudice and taxing all costs against plaintiff.

Respectfully submitted,

Arnold, Fortas & Porter, 1229–19th Street, N.W., Washington 6, D.C., By s/ Abe Fortas, A Member of the Firm;

Bass, Berry & Sims, 1000 American Trust Building, Nashville 3, Tennessee, By s/ Cecil Sims, A Member of the Firm;

Attorneys for Defendants.

[Certificate of service by Cecil Sims, Attorney, dated Oct. 7, 1957.]

Filed: Oct. 10, 1957.

[fol. 29] EXHIBIT 1 ANNEXED TO ANSWER

AGREEMENT OF MERGER

• • •

ARTICLE II

• • •

2. Upon the merger date all and singular the property, real and personal, and estates and interests therein, leases, leasehold interests, agreements, contracts, debts due on whatever account, things in action, undertakings, rights, powers, franchises, privileges, exemptions, immunities and every other thing of value of the Nashville & Louisville Company, Potter Towing Company, Inc., Miners Coal Company, Uniontown Coal Mining Company, Williams Coal Company and Crescent Coal Company shall automatically vest in the Nashville Coal Company, without any act or deed, and shall thereafter as effectually belong to the Nashville Coal Company, as the successor of the merged corporations, as they did to the said merged corporations. The Nashville Coal Company hereby assumes and hereby shall be responsible for and shall promptly and punctually perform all obligations, liabilities, duties, covenants and conditions of Nashville & Louisville Company, Potter Towing Company, Inc., Miners Coal Company, Uniontown Coal Mining Company, Williams Coal Company and Crescent Coal Company. The Nashville Coal Company shall have the right to make any and all defenses against all claims and demands arising out of such obligations, liabilities, duties, covenants and conditions that the merged corporations might have been entitled to assert in the premises. Nothing herein is intended to enlarge, extend or impair the lien of any indenture, agreement or other instrument executed by any of the parties hereto.

[fol. 30]

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF TENNESSEE

NASHVILLE DIVISION

[Title omitted]

MOTION FOR SUMMARY JUDGMENT BY DEFENDANTS
—Filed June 6, 1958

The defendants, by their attorneys, acting pursuant to Rule 56 of the Federal Rules of Civil Procedure, hereby move this Court for Summary Judgment in their favor, dismissing the complaint with prejudice, on the following grounds:

1. The admissions of the plaintiff, Tampa Electric Company, of record in this action, as shown by its complaint, and also by a document which plaintiff executed, and which is incorporated as Exhibit A in the Affidavit of R. R. Kramer attached to and filed with this Motion, establish first that there is no genuine issue as to any [fol. 31] material fact; and, second, that on undisputed facts defendants are entitled to judgment as a matter of law, for the reasons stated in the succeeding paragraphs 2 and 3.

2. The complaint alleges that a contract, attached thereto as Exhibit A, "is in all respects valid" and prays a declaratory judgment that the same is a "valid, lawful and enforceable contract and is binding upon the plaintiff and defendants, according to its terms" (Complaint, pp. 2, 3-4).

3. As a matter of law, for reasons more particularly shown in defendants' Memorandum of Points and Authorities simultaneously filed herewith, the alleged contract is illegal, void, and unenforceable by or against either party, in that, contrary to Section 3 of the Clayton Act (38 Stat. 731, 15 U. S. C. §14) and Sections 1 and 2 of the Sherman Act (26 Stat. 209, 50 Stat. 693, 15 U. S. C. §§1, 2), it necessitates the plaintiff's purchase of its entire coal re-

quirements for a period of twenty years, amounting to hundreds of thousands of tons and millions of dollars per year, from one single seller, to the exclusion of all competing sellers.

Wherefore, defendants pray that final judgment be entered, pursuant to Rule 56 of the Federal Rules of Civil [fol. 32] Procedure, dismissing the complaint with prejudice and taxing all costs against plaintiff.

Respectfully submitted,

Arnold, Fortas & Porter, 1229–19th Street, N.W., Washington 6, D.C., By Abe Fortas, Norman Diamond, Members of the Firm;

Bass, Berry & Sims, 1000 American Trust Building, Nashville 3, Tennessee, By Cecil Sims, A Member of the Firm;

Attorneys for Defendants.

[Certificate of service by Cecil Sims, Attorney, dated June 6, 1958.]

Filed: June 6, 1958.

[fol. 33]

IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF R. R. KRAMER IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Personally appeared before me the undersigned authority R. R. Kramer who made oath in due form of law that:

(1) His place of residence is 329 Cates Street, Maryville, Tennessee, and that he is the senior member of the law firm of Kramer, Dye, McNabb & Greenwood, which law firm has its offices in the Burwell Building at Knoxville, Tennessee;

(2) The law firm of Kramer, Dye, McNabb & Greenwood is the attorney of record for United Mine Workers of America in a certain civil action styled "Love and Amos Coal Company vs. United Mine Workers of America, et al.," being Civil Action No. 3167 presently pending in [fol. 34] the United States District Court for the Eastern District of Tennessee, Northern Division, and that affiant and E. H. Rayson of said law firm are the active members of said firm in the handling of said Action No. 3167;

(3) In connection with the preparation for trial of said Civil Action No. 3167 the deposition of John H. Amos was taken in Knoxville, Tennessee, on January 8, 1958, and in that deposition Mr. Amos filed as Exhibit 14 to his deposition the paper of which an exact copy is attached as Exhibit-A to this affidavit;

(4) The deposition of said John H. Amos, including the exhibits thereto, was filed in the above-styled Civil Action No. 3167 in the office of the Clerk of the United States District Court for the Eastern District of Tennessee, Northern Division, on January 20, 1958;

(5) Further affiant saith not.

R. R. Kramer, Affiant.

Sworn to and subscribed before me)
this 30th day of May, 1958.)

Grace L. Meek, Notary Public, My commission expires July 21, 1958.

(Seal)

[fol. 35]

EXHIBIT A, ANNEXED TO FOREGOING AFFIDAVIT

PURCHASE ORDER

A Business Managed Taxpaying Utility

from

TAMPA ELECTRIC COMPANY

December 23, 1957

Serving Florida's Center of Activity

No. 18763

IMPORTANT INSTRUCTIONS

1. Place our ORDER NUMBER on all INVOICES, memoranda and PACKAGES.
2. FORWARD INVOICE AND BILL OF LADING PROMPTLY.
3. Prepay all charges on goods purchased F. O. B. destination.

PLEASE RENDER INVOICES IN TRIPLICATE.

We reserve the right to cancel order if shipment is not made as promised.

To Love & Amos Coal Company
P. O. Box 1112
Nashville, Tennessee

Ship to Gannon Station
Bill to Tampa Elec. Co., Purchasing Dept.
P. O. Box 111, Tampa 1, Florida

This replaces our Purchase Order No. 15061 dated August 29, 1957:

[fol. 36] Coal requirements for our Gannon Station approximately as follows:

Year 1958	—	350,000 tons
Year 1959	—	700,000 tons
Year 1960	—	700,000 tons
Year 1961	—	1,000,000 tons

To increase as required to about 2,250,000 tons per year. Coal to have a minimum heat value equal to your Osborne mine coal and to be suitable for firing in our B & W cyclone burners. This order is contingent on a freight rate not to exceed $4.65 per ton.

Price—$4.15 per ton.

Cancellable on 12 months notice by supplier or purchaser. In the event West Kentucky Coal Company should begin to perform under our original contract with Nashville Coal Company this agreement will terminate forthwith.

s/ R. F. Connally
Purchasing Agent

No. 18763

EL
fuel—coal
Our Reg No. 6631, ADJ/VCS

[fol. 37]

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF TENNESSEE

NASHVILLE DIVISION

[Title omitted]

CROSS-MOTION FOR SUMMARY JUDGMENT BY PLAINTIFF —Filed July 11, 1958

The plaintiff, by its attorneys, acting pursuant to Rule 56 of the Rules of Civil Procedure, hereby cross-moves this Court for Summary Judgment in its favor and against the defendants with prejudice on the following grounds:

1. The undisputed allegations of the complaint, the affidavit of William C. MacInnes and the document annexed thereto and incorporated therein attached to and filed with this Cross-Motion, the affidavit of R. R. Kramer and the document annexed thereto and incorporated [fol. 38] therein attached to and filed with the defendants' Motion, establish first, that there is no genuine issue as to any material fact, and second, that on the undisputed facts the plaintiff is entitled to judgment as a matter of law, for the reasons stated in the succeeding paragraphs herein numbered 2 and 3.

2. As a matter of law, for reasons more particularly stated in the plaintiff's Memorandum of Points and Authorities filed herewith, the contract, annexed as Exhibit A to the plaintiff's complaint in this action, is in all respects enforceable and valid and binding upon the plaintiff and the defendants according to its terms.

3. Defendants' affirmative defenses must be stricken as a matter of law, for reasons more particularly stated in the plaintiff's Memorandum of Points and Authorities filed herewith, because the contract does not violate Section 3 of the Clayton Act (Act of October 15, 1914, c. 323, §3; 38 Stat. 731; 15 U. S. C. §14) or Sections 1 and 2 of the Sherman Act (Act of July 2, 1890, c. 647, §§1, 2, as amended; 26 Stat. 209, as amended; 15 U. S. C. §§1, 2)

in that the contract does not prevent the plaintiff from dealing with the defendants' competitors; in that the contract created competition; and in that the antitrust laws do not apply to a single transaction with a consumer when the seller does not have the power to exert leverage over the purchaser.

Wherefore, the plaintiff prays that final judgment be entered, pursuant to Rule 56 of the Rules of Civil Procedure, granting judgment in favor of the plaintiff and [fol. 39] against the defendants with prejudice and taxing all costs against the defendants.

Respectfully submitted,

Winthrop, Stimson, Putnam & Roberts, 40 Wall Street, New York 5, New York, By s/ William C. Chanler, a Member of the Firm.

Hooker, Keeble, Dodson & Harris, 1106 Nashville Trust Building, Nashville 3, Tennessee, By s/ David M. Keeble, a Member of the Firm;

Attorneys for the Plaintiff.

Filed: July 11, 1958.

[fol. 40]

AFFIDAVIT OF WILLIAM C. MACINNES IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

State of Florida)
County of Hillsborough) ss.:

William C. MacInnes, being duly sworn, deposes and says:

1. I am president of Tampa Electric Company, a member of the Board of Directors of the company and a member of the Executive Committee of the Board of Directors. I am an engineer, having graduated from Massachusetts Institute of Technology in 1927 with a master's degree in electrical engineering and have been actively connected with the electric utility business since 1927. During the

course of the past thirty-one years I have been associated [fol. 41] with various electric utility companies as an officer or director, and am fully familiar with the problems confronting generating plants that utilize coal, oil or gas as fuel.

2. I make this affidavit in support of the plaintiff's motion for summary judgment in the above captioned action and in opposition to the motion of the defendants for summary judgment.

3. Tampa Electric Company is a regulated (investor-owned), electric public utility serving the City of Tampa, Florida, and neighboring communities. The plaintiff is franchised by the municipalities it serves and its operations are regulated by the Florida Railroad and Public Utilities Commission.

4. In 1954 Tampa Electric Company operated two generating plants: the Hookers Point Station and the Peter O. Knight Station. There are five generating units at the Hookers Point Station; at the Peter O. Knight Station there are six generating units. All eleven units are oil burning. I am informed and believe, based on my familiarity with the electric utility business in Florida, that every electric generating installation in peninsular Florida burned oil at that time.

5. In 1954 the Board of Directors of Tampa Electric Company decided to expand the facilities of the company and build a new and additional generating station, to be known as the Francis J. Gannon Station, and ultimately to contain six generating units.

6. On May 23, 1955, Justin Potter signed a contract which provided, among other things, that he would deliver [fol. 42] to Tampa Electric Company sufficient coal to satisfy the operational requirements of two of the units planned for the new power plant, as well as four additional units when, as and if constructed and if Tampa Electric Company determined to burn coal in them, less 15% if Tampa Electric Company utilized any fuel provided by one

of its local customers. On behalf of Tampa Electric Company I agreed, among other things, to accept and pay for the coal. (A copy of the contract is annexed to the plaintiff's complaint as Exhibit A.)

7. The first unit at the Gannon plant commenced operating August 1, 1957; the second unit is nearing completion; the third unit is presently under construction, also as a coal burning unit.

8. I am informed and believe that this contract represented the first time in recent decades that a significant quantity of coal had been sold to any utility in peninsular Florida and that the contract represented also the first time in recent decades that a significant quantity of coal had been sold to any user in peninsular Florida.

9. Because of the demand for electrical energy in the area Tampa Electric Company serves, the unit already operating at Gannon Station is working 24 hours per day, seven days per week. That unit and the other units planned for Gannon Station have a known generating capacity, which capacity requires a quantity of fuel ascertainable in advance to within approximately 5%.

10. Tampa Electric Company is presently considering converting at least two oil burning units at the Hookers Point Station to coal. I annex to this affidavit, as Exhibit [fol. 43] A, a letter and proposed contract of Peabody Coal Company offering coal for use at the Hookers Point Station.

11. During the year 1956 Tampa Electric Company consumed more than 3,100,000 barrels of oil at the Hookers Point and Peter O. Knight Stations. 3,100,000 barrels of oil are equivalent to approximately 825,000 tons of coal of the grade and quantity provided for by the contract involved in this lawsuit. That comparison is derived as follows: The contract provides for coal having a heat content of 11,800 British thermal units (B.t.u.s) per pound or 23,600,000 B.t.u.s per ton. The average heat content of the oil purchased by Tampa Electric Company is 6,275,000

B.t.u.s per barrel. (One cubic foot of natural gas contains an average of 1,000 B.t.u.s of heat, but the only natural gas presently available in the State of Florida is being supplied to utilities and industries in the panhandle of the state.) It is on the basis of heat content that the relative value of fuels is determined.

12. Subsequent to the making of the contract of May 23, 1955, I learned that Justin Potter had sold his interests to the West Kentucky Coal Company, and on September 21, 1955, on behalf of Tampa Electric Company, I made the agreement (Exhibit B annexed to the complaint) accepting West Kentucky Coal Company as a guarantor.

13. For Tampa Electric Company to equip Gannon Station to burn coal has already necessitated a capital expenditure of $3,000,000 more than if the fuel initially chosen had been oil. I am informed and believe that to supply Tampa Electric Company under this contract has required a capital expenditure in excess of $7,500,000 by the defendants and their subsidiaries.

[fol. 44] 14. It was not until April 1957 that Mark Eastin, president of each of the three defendant companies, told me that his companies would not perform under the contract.

/s/ William C. MacInnes

Sworn to before me this)
3 day of July, 1958.)

/s/ John J. Fogarty, Notary Public, State of Florida at Large. My Commission expires April 26, 1960.

Notarial seal

EXHIBIT A, ANNEXED TO FOREGOING AFFIDAVIT

PEABODY COAL COMPANY

GENERAL OFFICES . PEABODY PLAZA . 301 OLIVE STREET
St. Louis 2, Missouri
Telephone Geneva 6-3400

April 23, 1958

Mr. A. D. Jones, Mechanical Engineer
Tampa Electric Company
Tampa, Florida

Dear Mr. Jones:

We are enclosing herewith draft of proposed contract for study and further discussion between us. We are planning to visit you again next week for this purpose.

[fol. 45] Among other things, we wish to discuss the desirability of including in the contract a provision that your company may, within a specified period of time, exercise an option to increase the tonnage by an agreed amount and, if you so desire, to take delivery at other points on Tampa Bay. Incidentally, this could be included in the contract or covered by accompanying letter or supplementary agreement.

Looking forward to seeing you next week, I am,

Yours very truly,

S. L. JEWELL
S. L. Jewell,
Vice President

SLJ:tjt
Enclosures

COAL SUPPLY AGREEMENT

THIS AGREEMENT, entered into this day of , 1958, between TAMPA ELECTRIC COMPANY, a Florida corporation (herein called "Buyer"), and PEABODY COAL COMPANY, an Illinois corporation (herein called "Seller"), witnesseth:

WHEREAS, Buyer desires to purchase from Seller and Seller desires to sell to Buyer, the coal hereinafter specified to be delivered to Buyer for use in its Hooker's Point power plant located on Tampa Bay near Tampa, Florida;

NOW, THEREFORE, in consideration of the foregoing and of the following mutual covenants and agreements of the parties, Seller agrees to sell, and Buyer agrees to pur- [fol. 46] chase, accept and pay for, coal of the quantity and quality hereinafter stated, upon the terms and conditions hereinafter set forth:

1. *Term*: Coal shall be purchased and sold hereunder during the period of twenty (20) years, commencing on the 1st day of May, 1959, unless an earlier or later date is mutually agreed upon.

2. *Source of Coal*: The coal to be delivered hereunder shall be supplied from the Ken Mine of Seller, provided that Seller reserves the right to furnish from other mine or mines located in Western Kentucky coals produced or sold by Seller, upon condition that such coal shall be delivered to Buyer at the same delivered cost per million BTU as if such coal had been delivered from Seller's Ken Mine.

3. *Quantity*: The quantity of coal to be supplied hereunder for the term of this Agreement is 4,000,000 tons, to be sold and delivered to Buyer at the rate of 200,000 tons annually in approximately equal monthly shipments. It is agreed that Buyer shall have the right, upon at least thirty (30) days written notice to Seller, to increase or decrease the quantity of coal to be delivered in any month or months by an amount or amounts which, in the aggregate, shall not exceed ten per cent (10%) of the base quantity for each year of the term of this Agree-

ment, provided that Seller shall not be obligated to deliver in any one month coal of a quantity more than fifteen per cent (15%) in excess of one-twelfth of the tonnage required to be delivered annually.

4. *Delivery*: The coal to be sold and delivered hereunder shall be delivered to Buyer in vessel alongside Buyer's [fol. 47] Hooker's Point Station dock on Tampa Bay and shall be delivered by Seller and accepted by Buyer in substantially equal monthly quantities. For each shipment of coal hereunder, Seller shall promptly mail or cause to be mailed to Buyer, a shipping notice showing weight of the coal shipped and shipping date.

5. *Quality*: The coal to be delivered hereunder shall have an "as received" average calorific value of at least 11,800 BTU's per pound, determined as provided in Section 11 hereof. The size shall be 3" x 0 or smaller.

6. *Base Price*: The Base Price to be paid by Buyer to Seller for coal hereunder shall be $7.316 per ton delivered in vessel alongside Buyer's Hooker's Point Station dock on Tampa Bay.

7. *Base Price Revision*:

(a) The Base Price shall be increased or decreased from time to time to reflect actual changes in Seller's cost per ton of producing and delivering hereunder coal produced at Seller's Ken Mine occurring after the date of this Agreement in the following:

(i) Wage rates, hours of work and conditions of employment (including payments to the Miners' Welfare Fund) under labor union contracts or collective bargaining with employees or labor union representatives;

(ii) Unit cost of materials and supplies;

(iii) Cost of electric power;

(iv) Rates of compensation paid to administrative, supervisory, technical and clerical employees;

[fol. 48] (v) Federal, state and local fees, licenses and taxes (except taxes measured on net income);

(vi) Cost of labor, supplies and fuel required in transportation and delivery.

(b) For the purpose of determining the amounts of the revisions to be made in the Base Price to reflect changes occurring due to items (i), (ii) and (iii) of Section 7(a), it is agreed that the following table which correctly sets forth the percentages of the original Base Price for the various items stated, shall be the basis for settlement:

(i) Cost of mine labor under labor union contracts or collective bargaining agreements	12.2%
(ii) Cost of mine material and supplies	8.7%
(iii) Cost of electric power	1.2%

(c) Buyer and Seller shall jointly determine changes in the Base Price to reflect increases or decreases in the cost of labor, supplies and fuel required in the transportation and delivery of the coal hereunder.

(d) The Base Price shall also be revised from time to time to compensate for the effects of inflation and/or deflation on Seller's profit per ton (meaning the average profit per ton after all costs and expenses, except federal, state or local taxes imposed on or measured by net income), as follows:

(i) Each revision shall be computed from changes in the Consumers Price Index (as issued by the [fol. 49] United States Department of Labor, Bureau of Labor Statistics) on the adjusted base that the average cost of all items therein for the years 1947 through 1949 equalled 100;

(ii) The index number for all items in said Index for April 1958 shall be used as the basis for computing the amount of any such revision;

(iii) To the extent and after said index increases more than twenty-five per cent (25%) above or decreases more than twenty-five per cent (25%) below said index number for April 1958, the said Base Price shall be revised to compensate for the effect thereof upon the purchasing power of Seller's profit per ton;

(iv) The first twenty-five per cent (25%) of such increase or decrease above or below said index number for April 1958 shall not be considered in computing the amount of any such revision of the said Base Price, and any such revision shall continue in effect only so long as said index continues to be more or less than twenty-five per cent (25%) above or below said index number for April 1958, as the case may be.

(e) When a change occurs in any of the items of cost referred to in this Section 7, the amount of the revision to be made in the Base Price by reason of such change shall be determined as promptly as possible, and shall be made retroactive to the date of such change in costs. Seller shall submit to Buyer all data reasonably required to establish the amount of change in cost per ton to the [fol. 50] Ken Mine of Seller of producing and delivering coal hereunder, and the parties agree to meet promptly and negotiate in good faith with respect to any change in price requested by either Buyer or Seller on account of any such change in cost.

(f) Notwithstanding that coal may be delivered from time to time from other mines, under the provisions of Section 2, revisions of the Base Price shall be based upon costs of production at Seller's Ken Mine.

8. The Base Price for coal furnished hereunder is based upon coal having a calorific value of 11,800 BTU's per pound, as received at Buyer's plant. Whenever the weighted average calorific value of all coal delivered hereunder during any calendar month is in excess of 11,900 BTU's per pound, or is below 11,700 BTU's per pound,

the Base Price shall be subject to adjustment each month so that the actual price per ton shall be greater or less than the Base Price in the same proportion that the weighted average calorific value of such coal bears to calorific value of 11,800 BTU's per pound.

The weighted average calorific value per pound of the coal delivered hereunder during each month shall be computed from the weights determined under paragraph 10 and from the sampling and analysis determined under paragraph 11.

9. *Billing and Payment*: On or before the fifteenth (15th) day of each calendar month Seller shall render to Buyer an invoice for all coal delivered hereunder by Seller during the preceding calendar month. Buyer shall, within fifteen (15) days after receipt of each invoice, pay to Seller, the net amount of the invoice. In the event a [fol. 51] revision of the Base Price is required but has not been ascertained at the time of preparation of the invoice, the billing shall be done on the tentative basis of the then existing Base Price, and as soon as possible after the revised Base Price is determined, an appropriate adjustment shall be made between Buyer and Seller.

10. *Weights*: The weights of the coal delivered and billed shall be determined by Buyer on continuous belt conveyor scales or other satisfactory weighing devices at plant of Buyer. Buyer shall promptly advise Seller at the end of each calendar month as to the weight of coal delivered by Buyer during that month.

Seller shall have the right to have a representative present at any and all times to observe the weighing of coal delivered hereunder at the plant of Buyer, and to test, or to have tested, Buyer's scales. If such tests show Buyer's scales to be in error, they shall be adjusted to an accurate condition.

11. *Sampling and Analyses*: For the purpose of ascertaining the calorific value of coal delivered hereunder, Buyer shall take from each shipment of coal received, before it is commingled with other coal, representative

samples of the coal and determine by proper analyses its calorific value. In the event Seller shall question either the sampling or analyses made by Buyer, Seller shall have the right to have samples taken and analyzed by a commercial testing laboratory, and the results of such sampling and analyses shall be binding upon both Buyer and Seller.

12. *Force Majeure*: If because of force majeure either Seller or Buyer is unable to carry out its obligations under [fol. 52] this Agreement (other than obligations of such party to pay or expend money for or in connection with the performance of this Agreement), and if such party promptly gives to the other party concerned written notice of such force majeure, then the obligations of the party giving such notice shall be suspended to the extent made necessary by such force majeure and during its continuance, provided the effect of such force majeure is eliminated in so far as possible with all reasonable dispatch. Any deficiencies in deliveries of coal under this Agreement which are caused by force majeure shall be made up by Seller as soon as practicable after the termination of the emergency caused by such force majeure, except to the extent, if any, that Buyer was required to and did purchase other coal in order to maintain its plant in operation during such emergency.

The term "force majeure" as used herein shall mean any unforseeable causes beyond the control and without fault or negligence of the party affected thereby, such as acts of God, acts of the public enemy, insurrections, riots, labor disputes, labor or material shortages, fires, explosions, floods, breakdowns of or damage to plants, equipment or facilities, interruptions to transportation, embargoes, orders or acts of civil or military authority, or other causes of a similar nature which wholly or partly prevent the mining, loading and/or delivering of the coal by Seller, or the accepting, unloading and/or utilizing of the coal by Buyer.

13. *Demurrage*: It is agreed that Buyer shall have thirty-six (36) hours free time after vessel or barge is secured alongside Buyer's dock for unloading vessels or

barges containing 10,000 net tons or less. After such free [fol. 53] time, Buyer will pay demurrage charges at the usual and customary rates in effect in the Tampa Bay area.

14. *Price Limitation*: In the event the price of coal is fixed by law at any time hereafter and such fixed price conflicts with any price or prices specified in this Agreement, then the parties hereto shall join in a petition to the proper governmental authority and shall exert all reasonable efforts in support of such petition to have this Agreement declared exempt from such law and/or to have such price or prices specified in this Agreement approved.

15. *Notices*: All notices under this Agreement shall be in writing addressed to the party to be so notified and delivered in person to its President or Vice President, or sent by certified or registered mail addressed to such party at its business office or at any such other address of which either party may notify the other in writing.

16. *Waivers and Remedies*: The failure of either Buyer or Seller to insist in any one or more instances upon strict performance of any of the provisions of this Agreement or to take advantage of any of its rights hereunder shall not be construed as a waiver of any such provisions or the relinquishment of any such rights, but the same shall continue and remain in full force and effect.

No default of any party to this Agreement in the performance of any of its covenants or obligations hereunder, which except for this provision would be the legal basis for rescission or termination of this Agreement by any other party hereto, shall give or result in such a right unless and until the party committing such default shall fail to correct the default within sixty (60) days after written notice of claim of such default and a statement setting forth the nature thereof is given to such defaulting party by the party claiming such default.

[fol. 54] 17. *Successors and Assigns*: This Agreement shall inure to the benefit of and be binding upon the parties hereto and their respective successors and assigns; but this

Agreement may not be assigned by Buyer without the written consent of Seller, nor by Seller without the written consent of Buyer, except that either Buyer or Seller may, without the consent of the other party, assign this Agreement to a successor to all or substantially all of its property and assets, either by purchase, merger, consolidation or otherwise.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year first above written.

TAMPA ELECTRIC COMPANY

By .....
(Title)

Witness:

.....

.....

PEABODY COAL COMPANY

By .....
(Title)

Witness:

.....

.....

[fol. 55]

IN UNITED STATES DISTRICT COURT

[Title omitted]

SUPPLEMENTARY AFFIDAVIT OF CHARLES H. SCHWANER IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

State of Florida)
County of Hillsborough) *ss.:*

Charles H. Schwaner, being duly sworn, deposes and says:

1. I am vice president in charge of finance of Tampa Electric Company.

2. I make this affidavit in support of the plaintiff's cross-motion for summary judgment in the above captioned action and in opposition to the motion of the defendants for summary judgment.

3. This affidavit supplements the affidavit of William C. MacInnes, sworn to on July 3, 1958, and annexed to the plaintiff's moving papers filed in this action. Mr. MacInnes is presently out of the state.

[fol. 56] 4. The fuel oil used by the eleven units at the Hookers Point and Peter O. Knight Stations is supplied by the Gulf Oil Corporation. Since the filing of Mr. MacInnes' said affidavit, Gulf Oil Corporation has offered to reduce its oil price to Tampa Electric Company by seven cents per barrel and to place a ceiling on price escalation. This offer was made for the avowed purpose of inducing Tampa Electric Company to refrain from converting oil burning units to coal and accepting the offer of Peabody Coal Company referred to in the said affidavit of Mr. MacInnes. Tampa Electric Company is presently considering this offer, together with the offer of Peabody Coal Company.

5. In addition, the Atomic Energy Commission has approved the application of Tampa Electric Company and

others to build an atomic reactor. It is planned that electricity generated by fissionable fuel will be on the lines of Tampa Electric Company by 1964.

CHARLES H. SCHWANER

Sworn to before me this 7) day of August, 1958:)

John J. Fogarty, Notary Public State of Florida at large. My commission expires April 26, 1960.

[Certificate of service by David M. Keeble, Attorney, dated Aug. 13, 1958.]

Filed: Aug. 13, 1958.

[fol. 57]

IN UNITED STATES DISTRICT COURT

EXCERPTS FROM DEFENDANTS' REPLY MEMORANDUM IN THE COURT BELOW

[Page 3, Footnote 3]

"At several places in its memorandum, the plaintiff states that the buyer and seller had 'equivalent bargaining power.' This is clearly not so. The Buyer (plaintiff) had overwhelming power or leverage. It was the only large coal consumer in the area, and the Seller was faced with intense competition in the depressed coal industry."

* * * * * * *

[Pages 4-5]

* * * * * * *

"The Seller did not occupy a dominant position in the business of producing or selling coal. On the contrary, according to the plaintiff, there are over 700 coal producers who produce coal suitable for its requirements * * *".

* * * * * * *

[fol. 58]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION
Civil Action No. 2418

TAMPA ELECTRIC COMPANY, Plaintiff,

—v.—

NASHVILLE COAL COMPANY, ET AL., Defendants.

OPINION OF MILLER, DISTRICT JUDGE, GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT—November 18, 1958

Received for Entry 11:15 A. M.
Nov. 18 1958
JOHN O. ANDERSON, Clerk
By FRANK WILLIAMS D. C.

This is an action for a declaratory judgment seeking to establish that a certain contract referred to as the Potter-Tampa contract is valid and enforceable and binding upon both the plaintiff and the defendants.

The defendants, hereinafter sometimes referred to as the Seller, have moved the Court for summary judgment, contending that there are no issues of fact to be decided by the Court, and that the undisputed facts establish the [fol. 59] illegality of the contract under Section 3 of the Clayton Act and Sections 1 and 2 of the Sherman Act. The plaintiff, Tampa Electric Company, hereinafter sometimes referred to as the Buyer, has also moved for summary judgment, insisting that the Potter-Tampa contract upon the basis of the undisputed facts is valid and enforceable. The Buyer is a large electric utility company serving Tampa, Florida, and its metropolitan area. Prior to the Potter-Tampa contract, oil was the only fuel used by the

Buyer in its production of electric power. It is at present constructing a new plant or station near Tampa, known as the Gannon Station, which will eventually contain six separate power-producing units. Two of these units have been completed and are using coal as fuel, and a third coal-burning unit is under construction.

The contract in issue was made May 23, 1955 between the Tampa Electric Company and Justin Potter and David K. Wilson, co-partners doing business as the Potter Towing Company. After a series of transfers Nashville Coal Company, Inc., a wholly owned subsidiary of West Kentucky Coal Company, succeeded to the Potter-Wilson position under the contract. The West Kentucky Coal Company then made an agreement with Potter and Wilson to indemnify them against any loss resulting from non-performance of the Potter-Tampa contract. After all transfers of the contract had been completed the Seller refused to perform on the ground that it was in violation of the Clayton and Sherman Acts, and subsequently the Buyer filed this action for declaratory judgment.

The terms of the Potter-Tampa contract are substantially as follows: The Seller agrees to provide the Buyer [fol. 60] and the Buyer agrees to purchase from the Seller all the coal required as fuel for the production of electric energy at the Gannon Station for a period of 20 years. The first two units of the plant now in operation will use coal as fuel, and as to these units "the full requirements shall not be less than 225,000 tons of coal per unit per year". It is agreed that a third unit now under construction will also use coal, and that all future units constructed will be supplied by the Seller if the Buyer elects to use coal as fuel. It is further stipulated that two years' notice will be given the Seller as to whether or not coal will be used in future units. The contract price is fixed at a minimum of $6.85, less a minimum rebate of 45 cents per ton for the first eighteen months and 30 cents per ton thereafter. There is no provision in the contract as to other plants now in operation or plants which might be constructed in the future, the contract applying only to the Gannon Station.

It is estimated by the Buyer that within a very few years the Gannon Station will consume more coal than is presently consumed in the entire State of Florida. Peninsular Florida's present coal consumption is approximately 700,000 tons per year as compared to the 450,000 tons required by the Potter-Tampa contract as a minimum for the first two units at the Gannon Station. The Buyer is presently purchasing coal for the first two units from Love and Amos Coal Company under a contract which is subject to cancellation on twelve months' notice by the Buyer, or subject to immediate cancellation should the Seller begin to perform under the Potter-Tampa contract.

[fol. 61] It is the contention of the Seller that the Potter-Tampa contract is invalid under Section 3 of the Clayton Act in that it is an agreement or understanding not to purchase the product of the Seller's competitors and as such its effect is to substantially lessen competition. The relevant provisions of Section 3 are as follows:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States * * * on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods * * * of a competitor or competitors of the * * * seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

To sustain the validity of the contract the Buyer insists, first, that the Potter-Tampa contract does not fall within the scope of Section 3 in that it does not have the effect of requiring that the purchaser shall not use the goods of a competitor of the Seller. In support of this argument it is pointed out that the Buyer, consistently with the Potter-Tampa contract, may use oil as a fuel in the remaining three units at the Gannon Station, and that it may use the coal of a competitor of the Seller in any

future plant to be constructed and in any present oil-[fol. 62] burning plant converted to the use of coal. However, in the present case the Court is persuaded that the Potter-Tampa contract is a requirements contract having the effect of requiring the Buyer not to use the goods of a competitor of the Seller within the intent and meaning of Section 3. It clearly provides, in effect, that the Buyer must buy only from the Seller all of its coal for the two units now in operation and for the additional unit now under construction at the Gannon Station, representing in fact all of the Buyer's present coal requirements. According to the Buyer's estimation, it will require 1,000,000 tons of coal per year at the Gannon Station by 1961. A contract to supply the total coal requirements of an operation of such magnitude for such a protracted exclusionary period clearly falls within the purview of the statute. The question must be decided upon the basis of realities and the contract construed reasonably in the light of existing facts. It is true that coal could conceivably be used in future plants or by converting existing plants, but there is no evidence that this is presently planned. While the possibilities suggested do exist the unalterable fact remains that the contract at issue is one which "pre-empts" or "engrosses" all of the known coal requirements of the Buyer—manifestly a large and substantial volume of commerce—for a period of 20 years.

This conclusion as to the effect of the contract under the Clayton Act is supported by the decision of the Supreme Court in International Salt Co., Inc. v. United States, 332 U. S. 392, 60 S. Ct. 12, 92 L. Ed. 20, in which the International Salt Company required tying arrangements wherein the lessees of its patented machines could use only [fol. 63] salt purchased from the lessor. In the year 1944 the company sold approximately 119,000 tons of salt for about $500,000 for use in its leased machines. The tying clause in practically all of its leases required the lessee to purchase from the lessor all unpatented salt and salt tablets consumed in the leased machines. The Government moved for summary judgment which was sustained by the trial court. On appeal the International Salt Company insisted that summary judgment was unauthorized because it pre-

cluded trial of alleged issues of fact as to whether the restraint was unreasonable within the Sherman Act or substantially lessened competition or tended to create a monopoly in salt within the Clayton Act. In rejecting this argument and in holding that the tying agreements were illegal the Court stated:

> "We think the admitted facts left no genuine issue. Not only is price-fixing unreasonable, per se, United States v. Socony-Vacuum Oil Co., 310 U. S. 150; United States v. Trenton Potteries Co., 273 U. S. 392, but also it is unreasonable, per se, to foreclose competitors from any substantial market. Fashion Originators Guild v. Federal Trade Commission, 114 F. 2d 80, affirmed, 312 U. S. 457. The volume of business affected by these contracts cannot be said to be insignificant or insubstantial and the tendency of the arrangement to accomplishment of monopoly seems obvious. Under the law, agreements are forbidden which 'tend to create a monopoly', and it is immaterial that the tendency is a creeping one rather than one that pro-[fol. 64] ceeds at full gallop; nor does the law await arrival at the goal before condemning the direction of the movement." (332 U. S. p. 396)

It was regarded as immaterial by the Court that the leases provided that if competitors offered salt of an equal grade at a lower price the lessee should be free to buy in the open market unless the lessor would furnish the salt at an equal price, and further that the lessee was entitled to any benefit of any general price reduction in the lessor's salt tablets. It was found that these provisions, while affording some measure of protection to the lessee, did not avoid "the stifling effect of the agreement on competition". Thus the decision would appear to stand for the proposition that a violation of Section 3 occurs if a substantial amount of business is removed from the area of competition even though there remains the possibility of use of a competitor's product.

Other decisions are to the same effect, i.e., that the possibility that a buyer might use a competitor's product does not exempt exclusive contractual arrangements from

the condemnation of the Clayton Act. Judson L. Thomson Mfg. Co. v. Federal Trade Commission, 1st Cir. 150 F. 2d 952, cert. denied, 326 U. S. 776, 66 S. Ct. 267, 90 L. Ed. 469; Signode Steel Strapping Co. v. Federal Trade Commission, 4 Cir. 132 F. 2d 48. The case of Federal Trade Commission v. Sinclair Refining Co., 261 U. S. 463, 43 S. Ct. 450, 67 L. Ed. 746, relied on by the Buyer, is deemed to be distinguishable because the lease involved left the buyer "free to buy wherever he chooses", or "to discontinue any or all" dealings with the Seller, whereas in the present case the Buyer is committed for a period of 20 [fol. 65] years to purchase from one Seller alone all coal consumed at one of its major plants.

The undisputed facts establish that the Gannon Plant's coal requirements will soon exceed in fuel equivalent all of the oil burned at the Buyer's other two plants. It is estimated that after 1961 the Buyer's coal requirements will increase as required to about 2,250,000 tons per year. Under the terms of the Potter-Tampa contract the Seller, alone, would have the opportunity to furnish this large amount of coal to the Buyer.

The Buyer's argument that the Potter-Tampa contract is not a requirements contract because coal competes with other fuel is not only contrary to the express language of Section 3, but it is also untenable when the decisions construing Section 3 are considered. It is true that oil is the fuel used in all plants operated by the Buyer other than the Gannon Station, and that oil could be used in the last three units to be built at the Gannon Station. But this fact becomes immaterial in view of the express language of Section 3 that an exclusionary agreement is unlawful where its effect may be to substantially lessen competition "in any line of commerce".

Although both oil and coal are fuels, each is a separate and distinct line of commerce. Thus it was held in George Van Camp & Sons Co. v. American Can Company, et al., 273 U. S. 245, 253, 49 S. Ct. 112, 73 L. Ed. 311, with reference to another section of the Clayton Act using identical language:

"The phrase is comprehensive and means that if the forbidden effect or tendency is produced in one

out of all the various lines of commerce the words 'in any line of commerce' literally are satisfied."

[fol. 66] And in United States v. E. I. du Pont de Nemours & Co., et al., 353 U. S. 586, 593, 77 S. Ct. 872, 1 L. Ed. 2d 1057, the Supreme Court in ruling that automotive finishes and fabrics were a separate line of commerce from other similar materials, stated:

"* * * automotive finishes and fabrics have sufficient peculiar characteristics and uses to constitute them products sufficiently distinct from all other finishes and fabrics to make them a 'line of commerce' within the meaning of the Clayton Act."

The Buyer further argues that the Potter-Tampa contract not only did not stifle or lessen competition but actually stimulated or increased it by introducing coal to Peninsular Florida and breaking the oil monopoly. It is pointed out that on the basis of the most recent figures at the time the contract was entered into coal accounted for less than 6 per cent of the fuel consumed in the entire state of Florida, and that every power-generating unit in Peninsular Florida burned oil in its boilers. It is said that discounting the Panhandle of Florida where all of the natural gas is consumed Peninsular Florida has been monopolized by oil. It is further argued that until coal was first burned in the units at Gannon Station a year ago there was virtually no challenge to oil's stranglehold in Peninsular Florida, and that this contract therefore, created competition where none had existed before. Conceding that coal is a newcomer to the Florida market and that its use by the Tampa Electric Company might stimulate the market and induce other consumers to convert to coal, the Court is of the opinion that this possibility does not save the contract [fol. 67] in issue from illegality under Section 3 of the Clayton Act. Inquiries of this kind were expressly rejected as irrelevant in Standard Oil Company of California, et al. v. United States, 337 U. S. 293, 69 S. Ct. 1051, 93 L. Ed. 1371. In that case the Standard Oil Company had made numerous contracts with independent dealers to

supply their full requirements for certain "Standard" products for a period of six months. There was no evidence that competition had actually decreased, but the Court held that Section 3 of the Clayton Act did not require such proof in order to establish a violation of its terms. In this connection it was stated:

> "* * * To interpret that section as requiring proof that competition has actually diminished would make its very explicitness a means of conferring immunity upon the practices which it singles out * * *" (337 U. S. p. 311)

The Court then concluded:

> "We conclude, therefore, that the qualifying clause of Section 3 is satisfied by proof that competition has been foreclosed in a substantial share of the line of commerce affected. It cannot be gainsaid that observance by a dealer of his requirements contract with Standard does effectively foreclose whatever opportunity there might be for competing suppliers to attract his patronage, and it is clear that the affected proportion of retail sales of petroleum products is substantial. In view of the widespread adoption of such [fol. 68] contracts by Standard's competitors and the availability of alternative ways of obtaining an assured market, evidence that competitive activity has not actually declined is inconclusive. Standard's use of the contracts creates just such a potential clog on competition as it was the purpose of Section 3 to remove wherever, were it to become actual, it would impede a substantial amount of competitive activity" (337 U. S. p. 314).

A similar situation exists in the present case, there being no direct evidence that competition would actually decrease as a result of performance of the contract. It is conceivable that competition might increase due to the introduction of a product into a comparatively new market. But the inescapable fact persists that the Potter-

Tampa contract for a period of 20 years excludes competitors of the Seller from a substantial amount of trade, although as the plaintiff asserts, the Seller was only one of 700 coal producers who could serve the same market. The contract is exclusionary to such a degree and the volume of commerce affected is manifestly so large that there is no escape from the conclusion that its effect under the circumstances disclosed is to "probably lessen competition or create an actual tendency to monopoly", to use the words of the Supreme Court in Standard Fashion Company v. Magrane-Houston Co., 258 U. S. 346, 357, 42 S. Ct. 360, 66 L. Ed. 653, language re-approved in Standard Oil Company of California v. United States, supra.

One reason for rejecting the argument in Standard Oil that actual lessening of competition must be shown was [fol. 69] the difficulty which the courts would encounter in adopting a proper standard of proof for such cases. It was observed that "to require firm prediction of an increase of competition as a probable result of ordering the abandonment of the practice, would be a standard of proof, if not virtually impossible to meet, at least most ill-suited for ascertainment by courts."

It is vigorously argued by the plaintiff that the Clayton Act does not apply to a requirements contract when the seller does not occupy a sufficiently powerful position in the market to enable him to assert "leverage" over the buyer. This argument is stated in the plaintiff's brief as follows:

> "Even assuming that the contract at issue required plaintiff to purchase all of its fuel requirements from the defendants for a period of twenty years there is nothing in the anti-trust laws themselves nor in any case construing them which would outlaw the contract. It is abundantly clear from an examination of the legislative history of Section 3 of the Clayton Act as well as the cases applying that section to so-called 'requirements contracts', that the sole evil sought to be prohibited was a practice, very prevalent when

the Clayton Act was adopted in 1914, whereby a seller who, by means of the economic leverage arising from a patent or from substantial economic control of a unique and desirable article, tied up a substantial portion of the retail or manufacturing market by requiring retail dealers or manufacturers who wished to deal in [fol. 70] his particular goods or utilize his patent to agree not to deal in the goods of a competitor. Clearly the contract here in issue bears no resemblance whatever to such agreements."

But here also it would appear that the plaintiff's argument is repelled by the decision in Standard Oil Company of California, supra. In referring to market dominance the court in that case held that the requirements contracts violated Section 3, even though:

"• • • Standard's share of the retail market for gasoline, even including sales through company-owned stations, is hardly large enough to conclude as a matter of law that it occupies a dominant position, nor did the trial court so find • • •". (337 U. S. p. 302)

Times-Picayune Publishing Co. et al. v. United States, 345 U. S. 594, 73 S. Ct. 872, 97 L. Ed. 1277, held that both proof of dominance in the market for the tying product and a showing that an appreciable volume of business in the tied product is restrained are essential conditions to judicial condemnation of a tying clause as a per se violation of the Sherman Act. But in the same case the court made it clear in its opinion that under the narrower standards of Section 3 of the Clayton Act either proof of market dominance or proof of restraint of a substantial volume of commerce would suffice to establish a violation. Thus, the court stated:

"From the 'tying' cases a perceptible pattern of illegality emerges: When the seller enjoys a monopolis- [fol. 71] tic position in the market for the 'tying' product, *or* if a substantial volume of commerce in the 'tied' product is restrained, a tying arrangement violates the

narrower standards expressed in Section 3 of the Clayton Act because from either factor the requisite potential lessening of competition is inferred." (345 U. S. p. 608)

The same distinction between the Sherman Act and the more limited and particularized provisions of the Clayton Act is to be borne in mind in considering Northern Pacific Railway Co., et al. v. United States, 356 U. S. 1, 78 S. Ct. 514, 2 L. Ed. 2d 545. The language of the court with respect to monopoly power or market dominance or control is limited to the facts of the case before the Court involving a tying agreement which was alleged to constitute an unreasonable restraint of trade under the general provisions of Section 1 of the Sherman Act. A Section 3 Clayton Act violation was neither claimed nor considered.

The wording of the statute itself lends no support to the argument that economic leverage or market dominance is a prerequisite to its violation and for this reason the effort to rely upon the legislative history of the Clayton Act would appear to be futile. The Court is of the opinion that the rationale of the court in Standard Fashion Company v. Magrane-Houston Co., supra, is applicable. In that case the court, in speaking of the legislative history of the Clayton Act, stated:

> "Much is said in the briefs concerning the Reports of Committees concerned with the enactment of [fol. 72] this legislation, but the words of the act are plain and their meaning is apparent without the necessity of resorting to the extraneous statements and often unsatisfactory aid of such reports." (258 U. S. p. 356)

Nor is there any merit in the plaintiff's contention that the Clayton Act applies only to instances where numerous contracts with various dealers are involved and not to a case of a single seller and a single buyer. This position is not sustained by authority and no support can be found for it in the language or the purpose of the statute. Both

language and purpose would be ignored if multiple buyers or sellers were held to be necessary to its violation.

The final contention of the plaintiff that Section 3 should not be applied where the buyer desires that the contract be performed is also without substance. The illegality of the contract under Section 3 renders it unenforceable at the suit of either party. In National Transformer Corp., et al. v. France Mfg. Co., 6 Cir. 215 F. 2d 343, 361, the court said:

> "It may be here emphasized that a contract which cannot be performed without violation of a statute is illegal and void. Where parties are in pari delicto, the law will leave them where it finds them, and all relief is refused because of the public interest * * *. The defendant may assert the invalidity of an agreement, even though he is a participator in the wrong * * *. The defense of illegality is allowed, not as a protection to the defendant, but as a disability to the plaintiff."

[fol. 73] It may be conceded that there are doubtless economic benefits inherent in the use of a requirements contract of this type, and that it seems somewhat harsh to invalidate such a contract, particularly when entered into by the parties of their own free will, in the evident belief that it was mutually advantageous, and without compulsion or constraint. But the Court's function is not to determine whether the contract is advantageous or desirable from the standpoint of the parties or of the public but whether it is legal. Under the circumstances of this record the two essential conditions are shown to invalidate the contract under Section 3 of the Clayton Act regardless of its merits or beneficial effects otherwise: First, the contract within the sense and meaning of Section 3 is one requiring the buyer not to use or deal in the goods of a competitor of the seller; and Second, the effect of the contract is to substantially lessen competition in a line of commerce. Since the Court is of the view that the contract is so condemned, its status under the Sherman Act need not be determined.

As the material facts shown by the pleadings, affidavits, and other pertinent papers, are not in dispute and no genuine issue of fact is involved, it follows that the defendant's motion for a summary judgment should be sustained and the plaintiff's similar motion overruled.

An appropriate form of judgment will be passed to the Court to implement this opinion declaring the rights of the parties accordingly.

William E. Miller, United States District Judge.

[fol. 74]

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF TENNESSEE

NASHVILLE DIVISION

Civil Action No. 2418

TAMPA ELECTRIC COMPANY, Plaintiff,

v.

NASHVILLE COAL COMPANY, et al., Defendants.

FINAL JUDGMENT—December 4, 1958

Received for Entry 9:15 AM
Dec 4 1958

John O. Anderson, Clerk
By Frank Williams

The complaint in this action having prayed for a judgment declaring that a certain described contract for the sale of goods to plaintiff, entered into on May 23, 1955, and thereafter supplemented and amended on September 21, 1955 and February 8, 1956, in respect of which the

defendants had succeeded to the rights and obligations of the original seller, "is a valid, lawful and enforceable contract and is binding upon the plaintiff and defendants, according to its terms"; and

[fol. 75] Defendants having filed their answer, alleging that the said contract "is illegal, void and unenforceable", due to its violation of the antitrust laws of the United States, and praying that the complaint be dismissed with prejudice; and

A motion and cross-motion for summary judgment under Rule 56, together with supporting affidavits and memoranda of law, having been respectively filed by defendants and plaintiff, wherein the parties asserted and agreed that there was no genuine issue between them as to any material fact; and

Oral argument on said motions having been heard by the Court on July 31, 1958, following which additional memoranda were filed by both parties and an additional affidavit was filed by plaintiff; and

The Court having considered all pleadings, affidavits and memoranda filed herein, and having found from the parties' undisputed allegations of fact, and their uncontroverted sworn statements of fact, and also from their admissions of fact (including admissions of fact disclosed in their memoranda), that there is no genuine issue between them as to any material fact and no disputed or controversial question of fact to be submitted for trial; and

The Court having decided, upon the basis of the findings of fact and conclusions of law set forth in its opinion, filed herein November 18, 1958, that defendants are entitled to judgment as a matter of law;

It is hereby ordered, declared, adjudged and decreed:

1. The contract of May 23, 1955, as supplemented and amended, between the plaintiff, an original party thereto, and the defendants, as successors to the rights and obliga-
[fol. 76] tions thereunder of Justin Potter and David K. Wilson, co-partners doing business as Potter Towing Com-

pany, is in violation of Section 3 of the Act of Congress approved October 15, 1914, commonly known as the Clayton Act, 15 U. S. C. §14, in that, within the meaning of that Act, it requires a purchaser of goods not to use or deal in the goods of a competitor of the seller and has the effect of substantially lessening competition in a line of commerce.

2. By reason of its aforesaid violation of the Clayton Act, said contract is illegal, void and unenforceable.

3. Plaintiff has no cause of action, and is entitled to no relief, against any or all of the defendants on account of the repudiation of said contract or of the failure, neglect or refusal of any or all of the defendants to perform any acts or undertakings in respect of said contract.

4. Plaintiff's complaint for declaratory judgment and this action be and they are hereby finally dismissed on the merits and with prejudice.

5. Defendants are entitled to have and recover from plaintiff their costs in this action and to have execution therefor.

Wm. E. Miller, United States District Judge.

Entered Dec. 4, 1958.

Consented to as to form:

Winthrop, Stimson, Putnam & Roberts; Hooker, Keeble, Dodson & Harris, Attorneys for Plaintiffs.

Arnold, Fortas & Porter; Bass Berry & Sims, Attorneys for Defendants.

[fol. 77]

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF TENNESSEE

NASHVILLE DIVISION

[Title omitted]

NOTICE OF APPEAL—Filed November 15, 1958

Please take notice that Tampa Electric Company, plaintiff above named, hereby appeals to the United States Court of Appeals for the Sixth Circuit from each and every part of the judgment granting defendants' motion for summary judgment and denying plaintiff's cross-motion for [fol. 78] summary judgment entered in this action on December 4, 1958.

Dated: Nashville, Tennessee
December 15, 1958.

Winthrop, Stimson, Putnam & Roberts, 40 Wall Street, New York 5, New York, By William C. Chanler, A Member of the Firm;

Hooker, Keeble, Dodson & Harris, 1106 Nashville Trust Building, Nashville 3, Tennessee, By David M. Keeble, A Member of the Firm;

Attorneys for the Plaintiff, Tampa Electric Company.

To:

Clerk, United States District Court for the Middle District of Tennessee, Nashville Division, Nashville, Tennessee.

Bass, Berry & Sims, 1000 American Trust Building, Nashville, Tennessee.

Arnold, Fortas & Porter, 1229 19th Street, N.W., Washington 6, D. C.

[fol. 79] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
No. 13,775

TAMPA ELECTRIC COMPANY, Appellant,

v.

NASHVILLE COAL COMPANY, NASHVILLE COAL, INC. and WEST KENTUCKY COAL COMPANY, Appellees.

On Appeal from the United States District Court for the Middle District of Tennessee, Nashville Division

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Appendix for Appellees—Filed March 6, 1959

[fol. 80]

IN UNITED STATES DISTRICT COURT

APPELLEES' APPENDIX

EXCERPTS FROM PLAINTIFF'S MEMORANDUM IN THE COURT BELOW

[Page 13, Footnote 6]

"In fact, [appellant's oil burning generators] burn the equivalent of almost double the quantity of coal guaranteed by the contract to be supplied to the first two units at the new generating station. In 1956 the 11 oil burning generating units consumed more than 3,100,000 barrels of oil, the equivalent of more than 825,000 tons of coal of the grade and quality involved in the contract at bar."

[Page 49]

* * * * * * *

"Potter was but one of over 700 coal producers capable of serving the plaintiff, and of course, his coal was no more 'unique' or otherwise desirable than that of his competitors."

* * * * * * *

EXCERPT FROM DEFENDANTS' MEMORANDUM IN THE COURT BELOW

[Page 6, Footnote 3]

"According to official statistics, published by the Federal Government, the minimum tonnage stipulated in the Potter-Tampa contract is more than double the total coal consumption of all electric utilities in Florida during the year 1956 (Federal Power Commission, *Electric Power Statistics*, Binder Section 2, Table I of Reports 57-1B to 57-12B, inclusive)."

[fol. 81]

EXCERPT FROM DEFENDANTS' REPLY MEMORANDUM IN THE COURT BELOW

[Page 17, Footnote 14]

"The fierce intensity of the competition that would be foreclosed by the enforcement of the Potter-Tampa contract is revealed by the testimony of Affiant MacInnes ([appellant's] president) in a recent rate proceeding (Florida Railroad and Public Utilities Commission, Docket No. 5724-EU, *Application of Tampa Electric Company for Approval, of Adjustments in its Rates for Electricity* Transcript of February 11, 1958, pp. 79, 90-91):

'Q. Now, have you contacted any other company to see——

A. Coal companies?

Q. Coal companies.

A. We have coal companies in and out of our office so fast that the receptionist doesn't know where to seat them to give them time to talk to people.

• • • • • • •

A. We have received innumerable offers of coal at various prices per ton. I couldn't possibly sit here and remember which price of coal per ton related to the BTU's per pound or any number of such things.'"

• • • • • • • •

[fol. 82]

EXCERPT FROM DEFENDANTS' SUPPLEMENTAL REPLY MEMORANDUM IN THE COURT BELOW

[Page 15, Footnote 4]

"In a recent proceeding before the Interstate Commerce Commission, concerning reductions in rail coal rates to Florida, [appellant's] witness testified as follows concerning the size of his company (I. C. C. Docket No. I & S 6825, *In the Matter of Coal—Southern Mines to Tampa, Florida, et al.*, Transcript of 3/11/58, pp. 126-7):

"The Tampa Electric Company serves an area of approximately 1700 square miles, located at the approximate geographical center of the Florida peninsula. Although this area covers only 3 per cent of the total land area of the state of Florida, it is interesting to note that it is over 1½ times as large as the state of Rhode Island. Within the boundaries of this service area, which contains 11 per cent of the population of Florida, lies one of the South's greatest potential industrial areas. For manufacturers interested in export and import, it is worthy of note that the deep water port of Tampa is nearer the Central and South American ports than any other major port in the United States.

The service area of the Tampa Electric Company extends from Tampa Bay eastward 60 miles to the center of the state, and is about 30 miles wide. Contained within this area is the calculated center of population of the entire state. The largest city and the center of industrial activity of the west Florida coast is Tampa. Other communities included in this territory are Port Tampa, Ruskin, Plant City, Dade City, Winter Haven, Oldsmar, Mulberry, Auburndale and Lake Alfred, and about fifty other small communities.'"

[fol. 83]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ARGUMENT AND SUBMISSION OF CAUSE—October 7, 1959

Before: Miller, Cecil, and Weick, Circuit Judges.

This cause is argued by William C. Chanlet for appellant and by Abe Fortas for appellees and is submitted to the court.

[fol. 84]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JUDGMENT—April 4, 1960

Appeal from the United States District Court for the Middle District of Tennessee.

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Tennessee, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

Approved for entry:

Shackelford Miller, Jr., United States Circuit Judge.

[fol. 85] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 13,775

TAMPA ELECTRIC COMPANY, Appellant,

v.

NASHVILLE COAL COMPANY, NASHVILLE COAL, INC., and WEST KENTUCKY COAL COMPANY, Appellees.

Appeal from the United States District Court for the Middle District of Tennessee, Nashville Division.

OPINION—April 4, 1960

Before: Miller, Cecil and Weick,* Circuit Judges.

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* On the day of the oral argument of the case in this Court, Judge Weick was a District Judge sitting by designation. He was sworn in as Circuit Judge on the following day.

Miller, Circuit Judge. The appellant, Tampa Electric Company, brought this declaratory judgment action in the District Court, pursuant to Sec. 2201, Title 28, United States Code, for the purpose of having its contract of May 23, 1955, providing for the purchase of coal by it from the appellees, declared valid and enforceable. The appellees contended that the contract was illegal and unenforceable by or against either of the contracting parties, in that it was contrary to Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act, *Sections 1, 2 and 14, Title 15, United States Code.* The facts not being in dispute, both the appellant and the appellees moved for summary judgment. The District Judge held that the contract was in violation of Section 3 of the Clayton Act, was therefore illegal and unenforceable, and that the appellant was entitled to no relief against any of the appellees on account [fol. 86] of their refusal to perform under the contract. *Tampa Electric Co.* v. *Nashville Coal Co.*, 168 F. Supp. 456, M. D. Tenn. This appeal followed.

Appellant is an electric public utility serving the city of Tampa, Florida, and neighboring communities. The appellees are engaged in mining and selling coal.

In 1954 appellant operated two integrated generating plants, both located on Tampa Bay, Florida, at which there were eleven generating units, all of which burned oil. In that year, in order to meet the increasing demand for electric energy in its service area, appellant decided to expand its facilities and build a new and additional integrated generating station on Tampa Bay, to be known as the Francis J. Gannon Station, at which it was planned to ultimately install six generating units.

The May 23, 1955, contract was for the purchase of coal for use at the Gannon Station. It was entered into between the appellant as the buyer and the Potter Towing Company, a Tennessee partnership of David K. Wilson and Justin Potter, as the seller. Subsequent to the making of the contract, the interest of Wilson and Potter was transferred to the appellee Nashville Coal Co. and thereafter to the appellee Nashville Coal, Inc., which is a wholly owned subsidiary of the appellee West Kentucky Coal Company. The West Kentucky Coal Company guaranteed

the appellant in writing against any loss or damage arising out of nonperformance of the contract.

The contract, after stating that the seller proposed to make available for sale to the buyer large quantities of coal from the West Kentucky field near Uniontown, Kentucky, and that the buyer desired to purchase certain coal for its use in its plant to be constructed near Tampa, upon the terms and conditions thereinafter set out, provided as follows:

> "Seller agrees to provide and deliver on the dock or docks of the Buyer at Plant Gannon coal to supply the total requirements of fuel of the Buyer for the operation of its first two units to be installed at the Gannon Station and the Buyer agrees to accept and pay for such fuel as provided in Article 4 hereof, which fuel requirements shall be not less than 225,000 tons of coal per unit per year. It is further agreed that if during the first 10 years of the term of this contract the Buyer constructs additional units in which [fol. 87] coal is used as the fuel, it shall give the Seller notice thereof two years prior to the completion of such unit or units and upon completion of same the fuel requirements thereof shall be added to this contract and be furnished by the Seller and accepted by the Buyer. It is understood that the Buyer has the option to be exercised two years prior to completion of said unit or units of determining whether coal or some other fuel shall be used in same. It is anticipated that deliveries will start approximately March, 1957 for the requirements of the first unit and that deliveries for the requirements of Unit #2 will begin when constructed."

It also provided,

> "The term of this agreement shall be for a period of twenty years from the first day of the month in which month first deliveries are made to the Buyer."

The first unit of the Gannon plant commenced operation August 1, 1957; the second unit on October 29, 1958. The

third unit, a coal burning unit, was under construction at the time this action was filed.

For the appellant to equip the Gannon Station to burn coal necessitated a capital expenditure of $3,000,000.00 more than if the fuel initially chosen had been oil. To supply the appellant under this contract required a capital expenditure in excess of $7,500,000.00 by the appellees.

In April, 1957, just before the first coal was to be delivered under the contract, the appellees advised appellant that they would not perform under the contract, which they contended was illegal and unenforceable by either party. As a result, it has been necessary for appellant to purchase its coal requirements in the market at a price substantially higher than that provided for in the contract.

In making such arrangements it estimated that its coal requirements for its Gannon Station were approximately as follows:

Year 1958	350,000 tons
Year 1959	700,000 tons
Year 1960	700,000 tons
Year 1961	1,000,000 tons

"To increase as required to about 2,250,000 tons per year."

At the time the contract was entered into, coal accounted for less than 6% of the fuel consumed in the entire state [fol. 88] of Florida. Every electric generating installation in peninsular Florida burned oil at that time. It was estimated by the buyer that within a very few years the Gannon Station would consume more coal than was presently consumed in the entire state of Florida. Peninsular Florida's coal consumption was approximately 700,000 tons per year.

Section 3 of the Clayton Act provides as follows:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to • • • contract for sale of goods, • • •, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States • • •, on the condition, agreement, or understanding that

> the * * * purchaser thereof shall not use or deal in the goods, * * *, supplies, or other commodities of a competitor or competitors of the * * * seller, where the effect of such * * * contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

Appellant's initial contention is that the statutory history of Section 3 shows that the Act was not intended to apply to consumers; that it was intended solely for the purpose of protecting dealers and retailers from certain specific practices whereby powerful sellers, through some form of economic leverage, frequently required them to execute agreements not to deal in a competitor's goods as a condition to the purchase of the seller's goods; and that Congress never contemplated that the Act should prevent a consumer from contracting for the purchase of his requirements of a single commodity, even though the amount was very substantial. In other words, Congress was concerned only with attempts by sellers, who were economically powerful, to restrain competition in the distributive process. The statutory language is not so restrictive. It expressly refers to "*a*" contract for sale "for *use*, consumption or resale." (Emphasis added.) The wording clearly includes a single sales contract for *use or consumption*, as well as multiple sales by sellers to numerous dealers or retailers for resale. There is nothing ambiguous about this language of the statute. Under such circumstances, we do not look to the legislative history of the Act in order to give it a different construction. In [fol. 89] *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346, the Court had under consideration the construction of Section 3 of the Clayton Act. The Court said, "Much is said in the briefs concerning the Reports of Committees concerned with the enactment of this legislation, but the words of the act are plain and their meaning is apparent without the necessity of resorting to the extraneous statements and often unsatisfactory aid of such reports." To the same effect is *Anchor Serum Co.* v. *Federal Trade Commission*, 217 F. (2) 867, 870, C. A. 7th; *George Van*

Camp & Sons v. *American Can Co.*, 278 U. S. 245, 253-254. See also: *Ohio Power Co.* v. *N. L. R. B.*, 176 F. (2) 385, 387, C. A. 6th, cert. denied, 338 U. S. 899; *Mid-Continent Petroleum Corp.* v. *N. L. R. B.*, 204 F. (2) 613, 623, C. A. 6th, cert. denied, 346 U. S. 856.

The statute condemns certain transactions, the effect of which may be to substantially lessen competition or tend to create a monopoly in any line of commerce. A single contract of sale of sufficient magnitude, with performance extending over an extended period of time, can cause this result. If it does have this result and is otherwise included within the plain wording of the statute, the statute must be construed in accordance with the Congressional purpose. *Securities & Exchange Commission* v. *C. M. Joiner Leasing Corp.*, 320 U. S. 344, 350-351; *Cornett-Lewis Coal Co.* v. *Commissioner*, 141 F. (2) 1000, 1004, C. A. 6th. In *Standard Oil Co. of California* v. *United States*, 337 U. S. 293, 302-305, the Supreme Court held Section 3 of the Act applicable to a situation where the seller did not occupy a dominant economic position in the industry.

Appellant contends that the contract of sale was not entered into "on the condition, agreement, or understanding" that the appellant would not use or deal in the goods of a competitor, which is necessary in order for the statute to be applicable. Concededly, the contract is a "requirements" contract and does not expressly contain the "condition" required by the statute. But, the contract provides for the appellees to supply the appellant its "total requirements" for the first two coal burning units and for such other units at the Gannon Station as would be constructed as coal burning units. The actual result of this contract is to prevent the purchaser from buying any coal for those units from a competitor of the appellees. We [fol. 90] agree with the ruling of the District Judge that the contract is one within the sense and meaning of Section 3 of the Clayton Act, in that it requires the buyer not to use or deal in the goods of a competitor of the seller, irrespective of the absence of the specific words contained in the statute. In *Standard Oil Co. of California* v. *United States*, supra, 337 U. S. 293, and *Anchor Serum Co.* v. *Federal Trade Commission*, supra, 217 F. (2) 867, C. A.

7th, the contracts therein declared illegal were "requirements" contract, which did not contain the unlawful condition in *haec verba*.

The foregoing ruling does not mean that "requirements" contracts are illegal per se. As pointed out in *Standard Oil Co. of California* v. *United States*, supra, 337 U. S. 293, 306-307, "requirements" contracts may well be of economic advantage to buyers as well as to sellers. The effect of the particular contract under the circumstances of the case is the determining factor. A "requirements" contract of some companies over a short period of time might well avoid the effect proscribed by the statute, while such a contract of large proportions and extending over a long period of years would clearly fall within the provisions of the statute. *United States* v. *Linde Air Products Co.*, 83 F. Supp. 978, 982, N. D. Ill.; *United States* v. *American Can Co.*, 87 F. Supp. 18, 31-32, N. D. Cal.

There is also an important difference between a "requirements" contract and a contract which calls for the purchase of a definite quantity over a period of time which the buyer estimates to be sufficient to meet his requirements. As pointed out in *United States* v. *Standard Oil Co.*, 78 F. Supp. 850, 867, S. D. Cal., when a dealer agrees to take a specific amount of a product, there is a likelihood that he may, by reason of unexpected shortages or increased demands, use competitive products, and competitors thus will have the opportunity of putting their products into competitive use by the buyer, with the ultimate result of inducing the buyer to handle their products. Under a "requirements" contract for a long period of time this chance is, for all practical purposes, cut off. As stated by the Supreme Court in *Standard Oil Co. of California* v. *United States*, supra, 337 U. S. 293, 314, "It cannot be gainsaid that observance by a dealer of his requirements contract with Standard does effectively foreclose whatever [fol. 91] opportunity there might be for competing suppliers to attract his patronage, * * *."

Appellant makes the further contention that Section 3 is not applicable because the contract does not prohibit it from dealing in the goods of a competitor, as required by the Act. It is argued that coal and oil are competitive

fuels, that the contract deals only with the purchase of coal, and that the appellant, as is permitted by the contract, buys oil from various suppliers for its non-coal burning units. It is also pointed out that there is the possibility that existing oil burning units could be converted to coal or that additional coal burning units, not covered by the contract, could be constructed, the coal for which could be purchased from any of appellees' competitors. The argument is a plausible one, but we believe it completely ignores the realities of the situation.

It is true that coal and oil are competitive fuels. *West Ohio Gas Co.* v. *Public Utilities Commission*, 294 U. S. 63, 72. But, for the purposes of Section 3 of the Clayton Act, we believe that each is to be treated as a separate, defined subdivision of the fuel industry generally. *George Van Camp & Sons* v. *American Can Co.*, supra, 278 U. S. 245, 253; *United States* v. *E. I. duPont de Nemours & Co.*, 353 U. S. 593-594; *Oxford Varnish Corp.* v. *Ault & Wiborg Corp.*, 83 F. (2) 764, 766, C. A. 6th. The present contract deals with coal and coal burning units only, and we treat as irrelevant appellant's purchases of oil for its oil burning units in an entirely separate plant at a different location.

At the time the contract was made, there were no coal burning units not covered by the contract. There is nothing to indicate that there is any planned or probable conversion of oil burning units into coal burning units or construction of coal burning units not covered by the contract. The contract requires the appellant to purchase all of its present, and its planned future, requirements of coal from a single seller. We agree with the ruling of the District Judge that the question must be decided upon the basis of realities and the contract construed reasonably in the light of existing facts. The remote possibility that a buyer might use a competitor's product is an immaterial factor in the actual picture before the Court. *International Salt Co.* v. *United States*, 6 F. R. D. 302, 307, S. D. N. Y., 332 U. S. 392; *Northern Pacific Railway Co.* v. *United States*, [fol. 92] 356 U. S. 1, 10, footnote 8; *Judson L. Thomson Mfg. Co.* v. *Federal Trade Commission*, 150 F. (2) 952, C. A. 1st, cert. denied, 326 U. S. 776; *Signode Steel Strap-*

ping Co. v. *Federal Trade Commission*, 132 F. (2) 48, C. A. 4th.

As appellant contends, it is not sufficient that the "requirements" contract is one which in substance prohibits the purchaser from dealing in the goods of a competitor of the seller. Under Section 3 such a contract is not invalid unless its effect "may be to substantially lessen competition or tend to create a monopoly in any line of commerce." In *International Salt Co.* v. *United States*, supra, 332 U. S. 392, 396, the Court ruled that where the volume of business affected by the contract cannot be said to be insignificant or insubstantial the tendency of the arrangement to accomplishment of monopoly seems obvious, pointing out that it is immaterial that the tendency is a creeping one rather than one that proceeds at full gallop. In *Standard Oil Co. of California* v. *United States*, supra, 337 U. S. 293, 314, the Court held that the qualifying clause of Section 3 is satisfied by proof that competition has been foreclosed in a substantial share of the line of commerce affected and that it was the purpose of Section 3 to remove a potential clog on competition wherever, were it to become actual, it would impede a substantial amount of competitive activity. Applying this standard to the present case there is no question but that the effect of the contract will be to substantially lessen competition. At the estimated 1959 rate of consumption, namely 700,000 tons per year, it would about equal peninsular Florida's annual coal consumption prior to the execution of the contract. Using the estimated 1,000,000 tons for 1961 as the average annual purchases during the twenty year life of the contract, the total dollar pre-emption over the life of the contract at the minimum price of $6.40 per ton would amount to $128,000,000.00. This is, of course, not insignificant or insubstantial.

Nor is the case removed from the operation of the Act by the fact that the contract would have overall beneficial results in starting the substantial use of coal in peninsular Florida and thus afford substantial competition to the use of oil. The possible benefits that may result from one particular contract, by reason of the special circumstances applicable to it, cannot override the general policy of the

[fol. 93] Act prohibiting transactions which tend to create a monopoly in any line of commerce. *Pennsylvania Water & Power Co.* v. *Consolidated Gas, Electric Light & Power Co.*, 184 F. (2) 552, 559, C. A. 4th, cert. denied, 340 U. S. 906; *Standard Oil Co. of California* v. *United States*, supra, 337 U. S. 293, 311-312.

Although the contract is in violation of the statute and therefore illegal, appellant contends that the appellees should not be allowed to take advantage of their own illegal act to relieve themselves of a contract obligation which now appears burdensome. Appellant recognizes the well settled general rule that a court will not lend its assistance in any way towards carrying out the terms of an illegal contract. *McMullen* v. *Hoffman*, 174 U. S. 639, 654; *E. E. Taenzer & Co.* v. *Chicago, R. I. & P. Ry. Co.*, 191 F. 543, 550, C. A. 6th; *National Tranformer Corp.* v. *France Mfg. Co.*, 215 F. (2) 343, 361, C. A. 6th. But, it urges upon us a well recognized exception to this general rule that if the parties are not in *pari delicto* and the undertakings of each are not equally blameworthy, a court of equity may, in furtherance of justice and of a sound public policy, aid the one who is comparatively the more innocent. *Marshall* v. *Lovell*, 19 F. (2) 751, 753-754, C. A. 8th; quoting from *Pomeroy's Equity Judisprudence, 4 Ed. Section 942; Restatement, Contracts, Section 601; 6 Corbin, Contracts, Section 1540 (1951); Ring* v. *Spina*, 148 F. (2) 647, 653, C. A. 2nd; *Allgair* v. *Glenmore Distilleries Co.*, 91 F. Supp. 93, 95-96, S. D. N. Y.; *Hartford-Empire Co.* v. *Glenshaw Glass Co.*, 47 F. Supp. 711, 717, W. D. Pa. Appellant points out that Section 3 of the Clayton Act is directed against the seller; its purpose is to protect the buyer; and that the case falls within the exception.

We think that our decision on this issue is controlled by the recent analysis of the problem by the Supreme Court in *Kelly* v. *Kosuga*, 358 U. S. 516. In that case the Court rejected the defense of illegality in an action under a contract which violated the Sherman Anti-Trust Act, but pointed out that in a restricted class of cases the defense was a valid one. If the contract is of such a nature that a part of it constitutes an intelligible economic transaction in itself and the enforcement of that portion of the contract would not be to enforce a violation of the

Act, then such portion of the contract will be enforced in order to avoid an inequitable result. But, the Court will [fol. 94] not enforce a contract which is illegal under the anti-trust laws of the United States if, in doing so, the Court would be a party to carrying out of one of the very restraints forbidden by the Act. *Kelly* v. *Kosuga*, supra, at page 520; *Continental Wall Paper Co.* v. *Louis Voigt & Sons Co.*, 212 U. S. 227, 261-263. It is immaterial whether the contract was for the benefit of the seller or the buyer. The determining factor is whether the result of the contract had the proscribed effect and this is so, even though the result is a harsh one for one of the parties. *Anchor Serum Co.* v. *Federal Trade Commission*, supra, 217 F. (2) 867, 870, 873, C. A. 7th. The aid of the Court is denied not for the benefit of either of the parties, but because public policy demands that it should be denied without regard to the interests of individual parties. *Continental Wall Paper Co.* v. *Louis Voigt & Sons Co.*, supra, 212 U. S. 227, 262.

The contract in the present case is an executory one. It is not at the present time divisible into an executed portion and an executory portion so as to permit recovery for any portion which may have been performed without ordering a violation of the Act in the future. The appellant is seeking to have declared valid the very provisions which make it invalid. To do so would be to compel the parties to engage in business with each other over a period of twenty years in a manner which the Act declares invalid. The recent decision of the Court of Appeals for the Seventh Circuit in *Beloit Culligan Soft Water Service, Inc.* v. *Culligan, Inc.*, 274 F. (2) 29, December 15, 1959, rehearing denied January 12, 1960, is, we believe, distinguishable for the same reasons. Under such circumstances, the Court will not assist either party in its enforcement.

This view of the case makes it unnecessary to consider the effect of Sections 1 and 2 of the Sherman Act.

The judgment is affirmed.

Weick, Circuit Judge, dissenting. It is with reluctance that I have filed this dissenting opinion, particularly in view of the careful consideration which this case has received by the majority and by the District Judge. With

deference to my colleagues, whose views I respect, I am of the opinion that the authorities on which they relied, when applied to the facts of this case, do not compel the [fol. 95] decision which they reached. I think the judgment below has produced a harsh result, not in the contemplation of the Clayton Act, which is being enforced against the wrong party.

The seller[1] has successfully avoided its contractual obligations with the defense that in making the contract of sale it violated the anti-trust laws, § 3 of the Clayton Act (Title 15 U. S. C. § 14). While this defense has been frequently resorted to by buyers in attempting to avoid payment of their indebtedness to sellers, it is, I submit, somewhat unusual for a seller to plead its own violation of the anti-trust laws in asking a court to relieve it of its contractual obligations, particularly since these laws were aimed at sellers and not buyers.

The type of defense availed of here by the seller has not met with favor by the Supreme Court when invoked by a buyer. *Kelly* v. *Kosuga*, 358 U. S. 516, 518 (1959); *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U. S. 743 (1947); *Wilder Mfg. Co.* v. *Corn Products Refining Co.*, 236 U. S. 165 (1915); 42 *University of Virginia Law Review* 785.

In enacting the anti-trust laws Congress created a right and prescribed the remedy. The remedy of private parties injured by reason of violation of the anti-trust laws is an action for treble damages[2] and injunction.[3] There are also enforcement provisions for injunctive relief in actions by the Federal Trade Commission[4] and the United States.[5]

The remedy provided private parties would seem to be adequate, namely, the recovery of treble damages and an

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[1] For the purposes of this opinion appellant will be referred to as Tampa or buyer and appellee as seller.

[2] Title 15 U. S. C. § 15.

[3] Title 15 U. S. C. § 26.

[4] Title 15 U. S. C. § 21.

[5] Title 15 U. S. C. § 25.

injunction to stop the illegal practices. In any event, the statutory remedy is all that Congress provided. Congress could have vitiated contracts made in violation of the Clayton Act. It did not do so.

The provisions of the Clayton Act are materially different from Section 1 of the Sherman Act. The Sherman Act is directed to "every contract . . . in restraint of [fol. 96] trade or commerce . . . is declared to be illegal." 15 U. S. C. 1. The Clayton Act is directed against the person. It provides: ". . . It shall be unlawful for any person . . . to contract for sale of goods . . ." Criminal sanctions are imposed for violation of the Sherman Act, but not for violation of the Clayton Act.*

Appellee successfully argued in the District Court that the legislative history of the Clayton Act should be ignored, on the authority of *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346, 356 (1922).

While it may have been crystal clear in *Standard Fashion* that the contract there involved was a violation of the Clayton Act, I feel that it is not so apparent when applied to the contract here. The legislative history is important because it aids in the interpretation of the statute and reveals that Congress never intended the law to be applied to such a case as the one at bar.

In *Harrison* v. *Northern Trust Co.*, 317 U. S. 476, 479 (1943), the Court said:

> But words are inexact tools at best, and for that reason there is wisely no rule of law forbidding resort to explanatory legislative history no matter how "clear the words may appear on superficial examination."

Mr. Justice Holmes, in *Towne* v. *Eisner*, 245 U. S. 418, 425 (1918), said:

> A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances in which it is used.

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* The bill as it passed the House of Representatives contained criminal sanctions. These were eliminated in the Senate.

It has been well stated:

> The records of legislative assemblies once opened and read with a knowledge of legislative procedure often reveal the richest kind of evidence . . . Legislative history similarly affords in many instances accurate and compelling guides to legislative meaning . . . To ignore legislative processes and legislative history in the processes of interpretation, is to turn one's back on whatever history may reveal as to the direction of the political and economic forces of our time. Landis, *A Note on Statutory Interpretation.* 43 *Harvard L. Review* 886, 888, 889, 892.

[fol. 97] The evils sought to be remedied by the Clayton Act were set out in the reports of the Congressional committees, in the hearings before the committees and in the debates.[1]

The evils were declared to be exclusive or tying contracts made between manufacturer and dealer whereby the latter specifically agreed not to deal in the commodities of the seller's competitors and contracts tying non-patented articles to the sale of patented articles.

The legislative proceedings are all too clear that what Congress was aiming at was monopolistic practices of powerful sellers in the distribution of goods whereby the dealer or buyer was prohibited from dealing in the goods of the seller's competitors. The legislation was directed against sellers, not buyers, and was intended to curtail the monopolistic practices of the commercial and industrial giants of the day.

At the same time, the need was recognized for more effective legal relief to private parties injured by violation of the anti-trust laws. Private parties threatened by loss or damage from violation of the law were given the right to injunctive relief, and treble damage actions were facilitated by making judgment in a Government suit or prosecution prima facie evidence of the violation there established.

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[1] H. R. Rep. No. 627, 63rd Cong. 2nd Session (May 6, 1914); S. Report No. 698, 63rd Cong. 2nd Session (July 22, 1914); 51 Cong. Rec. 9406, 9407, 9160, 14226, 14270.

Despite these efforts to aid private parties, no action was taken to incorporate the provisions of pending bills which would have authorized broad application of the defense that the plaintiff in a civil action had violated the anti-trust laws. Lockhart, *Violation of the Anti-trust Laws as a Defense in Civil Actions*, 31 Minn. L. R. 507, 551.

Annexation of the illegality defense to the statute by implication either as an inference of unexpressed intention of Congress or as the result of some doctrine of common law, would be justified only if it would be at least a rational, nondiscriminatory and appropriate means of making the policy of the statute effective. Cf. *Bruce's Juices* v. *American Can Co.*, 330 U. S. 743, 752 (1947).

The buyer was a privately owned public utility engaged in the production and sale of electricity. It served the City of Tampa and surrounding communities. It operated under franchise from the State of Florida and was regulated by public authority. Its rates were fixed by the [fol. 98] Public Utility Commission of Florida. It was a monopoly operating under legal sanction.

While this did not give Tampa license to violate the anti-trust laws, *Pennslyvania Water & Power Co.* v. *Consolidated Gas, Electric Light & Power Co.*, 184 F. 2d 552 (C. A. 4, 1950), cert. denied 340 U. S. 906 (1950), nevertheless, its needs and requirements as a regulated public utility, which were materially different from those of private industry, are factors that must be considered in determining the propriety of the contract in the present case. As was stated by the Court of Appeals for the District of Columbia in *Pennsylvania Water & Power Company* v. *Federal Trade Commission*, 193 F. 2d 230, 234 (C. A. D. C., 1951), aff'd 343 U. S. 414 (1952), "the anti-trust laws can have only limited application to industries regulated by specific statutes." The Court observed that laws aimed at combatting monopolistic practices must be applied somewhat differently to those industries which are of themselves monopolies because of public grant, the exigencies of nature, or legislative preference for a particular way of doing business.

The buyer was under obligation to the public to furnish a continuous supply of electricity at rates fixed by the

public utilities commission. To meet these obligations it was not only desirable, but absolutely necessary that it be supplied with the boiler fuel to make the electricity. Its rates could not be fixed for any appreciable length of time if it were required to depend upon a fluctuating market price for boiler fuel. It would certainly not be in the public interest to require a utility to purchase boiler fuel on short term contracts or on the open market so that every time there was a shift in the market price, the utility's rates to the public would have to be adjusted.

It is fairly inferable from the record that a rise in the market price of coal took place subsequent to the date of the contract and prior to the time for commencement of deliveries thereunder because, after the seller's repudiation, the buyer had to pay a substantially higher price than the contract price for its requirements of coal. The contract, however, contained an "escalator clause" to take effect upon the commencement of the contract in 1957 providing for adjustments based on the average weekly gross earnings of production workers in manufacturing industry. [fol. 99] The fact that the buyer was required to pay a substantially higher price for coal after the seller's repudiation demonstrates the wisdom of having an enforceable contract. Having such a contract would not only fix the price of coal, but also ensure the continuity of supply. In order to take care of the requirements of its customers, which undoubtedly involved seasonal low and peak loads, a requirements contract seemed best adapted for Tampa's needs. The contract contained a provision for adjustment of any gross inequity that could result from the economic conditions not contemplated by the parties, which was to be corrected by agreement or arbitration.

In the case of *Twin City Pipe Line Co.* v. *Harding Glass Co.*, 283 U. S. 353 (1931), the contract in suit called for the largest consumer of gas in Fort Smith, Arkansas to take all its requirements from one company, which amounted to a million to a million and a half cubic feet per day. The pipe line company sued for specific performance of the contract. The contract in question had no time limit, but the consumer did have the option to purchase other gas if the gas company could not deliver

an adequate supply. Although the defense interposed was that the contract was contrary to the public policy and laws of Arkansas, the considerations involved were that the contract was illegal because "it [was] in restraint of trade, tends to the monopolization at Ft. Smith of the sale of gas by the pipe line company, and is an undue restraint of business competition between companies supplying gas." 39 F. 2d 408, 409. The Court of Appeals held the contract to be illegal. 39 F. 2d 408 (C. A. 8). The Supreme Court reversed, and entered judgment for the plaintiff. In so doing the Court stated:

> . . . The contract does not subject the glass company to, or tend in any manner to impose upon the public, any wrong, disadvantage or evil attributable to monopoly or restraint of trade.
>
> The glass company has failed to show that the contract has any tendency to injure the public, and no reason appears why it should not be enforced according to its terms. 283 U. S. 353, 358.

In the case of *In the Matter of Houston Texas Gas & Oil Corp.*, 16 F. P. C. 118 (1956), the Federal Power Commission approved a 20 year requirements contract under which gas would be brought into Florida to compete with [fol. 100] oil. Its approval was conditioned on elimination of cancellation provisions. The Court of Appeals affirmed in *Florida Economic Advisory Council* v. *Federal Power Commission*, 254 F. 2d 643 (C. A. D. C., 1957), cert. denied 356 U. S. 959 (1958), stating: "... The injury to petitioner [the oil concerns] is that it must share what has heretofore amounted to a power monopoly," id., 649. Cf. *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U. S. 332 (1956).

The long term of this contract (20 years) and the fact that over the years it involved a large amount of coal were factors taken into account by the majority in holding it illegal. The business of the buyer required it to use large quantities of boiler fuel. Yet as compared with oil, only two units were using coal whereas eleven units were burning oil.

Prior to the seller's repudiation of the contract, Tampa, in reliance on the contract, had made a capital expenditure of $3,000,000 more than would have been required for oil burning equipment. The seller had also expended $7,500,000 in order to place itself in position to perform the contract. It is, of course, unfortunate for both parties that the seller did not discover that it had violated the law until after these large capital expenditures had been made. Assuming that each entered into the contract with the profit motive in mind, I do not think that 20 years was an unreasonable length of time in which to amortize, out of profits, these large capital expenditures.

It is my firm conviction that, read in the light of its legislative history, the Clayton Act was never intended to vitiate a requirements contract made by a single public utility to ensure a continuing supply of boiler fuels at a constant price. Such a contract is not only an economic necessity in circumstances such as these, but also serves the best interest of the public, who in the long run must shoulder the burden of increased costs of the utility. The holding in the *Twin City* case, supra, and the insistence upon such a contract by an agency of the United States in the *Houston Texas Gas & Oil* proceedings, supra, only serves to substantiate that opinion.

Even if the view is taken that the Clayton Act is applicable to the contract in suit, I feel that no violation thereof has been established.

[fol. 101] In order for the contract of sale to violate the Clayton Act two elements must be proven. First, that the contract was "*on the condition, agreement or understanding* that the . . . purchaser . . . shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor . . . of . . . seller." Second, the effect must be to substantially lessen competition or create a monopoly in any line of commerce (Emphasis added.)

No such condition was embodied in the written contract either expressly or by fair implication. All that the contract provided was for the supply of the buyer's total requirements *for the first two coal burning units to* be in-

[1] Title 15 U. S. C. § 14.

stalled at the Gannon Station and for any others built there *during the first ten years* of the contract. Eleven existing units were burning oil. The buyer was free to convert all of its oil burning units to coal burning units and purchase its coal therefor from anyone it chose. Such possible conversion is not as remote as was claimed. In an affidavit of Tampa's president, it is stated that conversion of other units is presently being considered. The buyer was also free to erect new coal burning units at any place other than at Gannon Station, and after ten years at the Gannon Station, and buy its coal from any one. The buyer also had the option at the Gannon Station to reduce the quantity of coal by 15% if it desired to use the by-product of a local supplier.

Since the contract contained no such condition, agreement or understanding as the Clayton Act proscribes, the Act had no application to the present case. But the seller claims that any "requirements" contract comes within the purview of the Clayton Act. I do not agree. A requirements contract could not come within the scope of the Act unless in effect it prohibited the buyer from dealing in the goods of any one else and operated substantially to lessen competition or create a monopoly. If the contract was to purchase only part of the buyer's requirements and he is free to purchase the remainder elsewhere, no violation of the statute occurs.

Looking at the actualities of the case, the buyer was not a dealer in coal or oil. It consumed both in making electricity which it sold to the public. In the very real sense, [fol. 102] coal and oil were competitive fuels and the buyer was using both. Eleven of its units were oil burning and only two were to be coal burning. Prior to the construction of the coal burning units at its Gannon Station the buyer used only oil. In fact, on account of the contract in question coal for the first time broke into the Florida utility market which theretofore had been heavily blanketed by large oil companies.

The fact that the contract provided for the buyer's requirements at the two units of the Gannon Station did not bring the contract within the scope of the Clayton Act because it did not foreclose the buyer from using coal in

other plants or dealing with the seller's competitors elsewhere.

It must be remembered that at the time of the contract the Gannon Station had not been erected. The contract provided for something to be done in the future. It did not limit Tampa in converting or constructing other coal units anywhere or purchasing coal from anyone except for use at the Gannon Station. The buyer had no interest in creating a monopoly of coal in the seller.

But even if the contract could be construed as requiring the buyer to take all its requirements of coal from seller, under the facts and circumstances of this case, there was no violation of the law.

Of importance in this regard is the holding that, in the circumstances of this case, coal constitutes a "line of commerce." The coal was purchased by Tampa as a source of power for its generators, not for resale to ultimate consumers. It was to be used as a boiler fuel.

The record shows that the Atomic Energy Commission has approved the application of Tampa to build an atomic reactor. It is planned that electricity generated from fissionable fuel will be on its lines by 1964. In order to induce Tampa not to convert its other boilers from oil to coal the oil companies have offered to reduce the price of oil.

It is my conviction that the line of commerce in which these parties were dealing was boiler fuels, not just coal. If the line of commerce is boiler fuel generally, then this contract could not come within the purview of Section 3 of the Clayton Act, as Tampa was certainly free to purchase boiler fuels, other than coal, from whoever it chose. [fol. 103] The standard to be applied in determining what constitutes a line of commerce is derived from three recent Supreme Court decisions, *International Boxing Club* v. *United States*, 358 U. S. 242 (1959); *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U. S. 586 (1957), and *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U. S. 377 (1956).

In the *International Boxing Club* case the question presented was whether championship boxing contests were distinct from all professional boxing events. The Supreme Court held they were.

In the 1957 *du Pont* case the question presented was whether automotive fabrics and finishes were distinct from all other fabrics and finishes. The Supreme Court held they were.

In the 1956 *du Pont* case the question presented was whether cellophane was distinct from all other flexible packaging materials. The Supreme Court held it was not.

In each of those cases the test applied was constant, while the results differed. The test was enunciated in the *du Pont* cellophane decision (351 U. S. 377):

> Determination of the competitive market for commodities depends on how different from one another are the offered commodities in character or use, how far buyers will go to substitute one commodity for another. (at p. 393)
>
> What is called for is an appraisal of the "cross-elasticity" of demand in the trade. See Note, 54 Col. L. Rev. 580.
>
> The varying circumstances of each case determine the result. In considering what is the relevant market for determining the control of price and competition, no more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purposes make up that "part of the trade or commerce", monopolization of which may be illegal. (at pp. 394-5)
>
> An element for consideration as to cross-elasticity of demand between products is the responsiveness of the sales of one product to price changes of the other. (at p. 400)
>
> The "market" which one must study to determine when a producer has monopoly power will vary with the part of commerce under consideration. The tests [fol. 104] are constant. The market is composed of products that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered. (at p. 404)

With the basic criteria in mind, the three decisions are easily reconciled. As was developed in extensive findings of fact in the *du Pont* cellophane case, a variety of prod-

ucts are wrapped in both cellophane and several other flexible packaging materials. More simply, a loaf of bread can be wrapped with equal facility in cellophane, wax paper, etc. They are interchangeable. On the other hand, a car cannot be painted with house paint and vice versa. Hence, the result in the 1957 *du Pont litigation*. As to the *International Boxing Club* decision, the Court found that, in public appeal, championship fights exert a different drawing power than do other boxing matches. The decaying status of professional boxing in the United States attests to that fact, as it is only the occasional "glamour" fight which is able to create even a ripple of public enthusiasm.

It is interesting to note though, that in each of the decisions the line of commerce was of such scope as to include sub-divisions within it. The general classification of championship fights covers bouts in each weight class; automotive finishes and fabrics have many variations; the diversity of flexible packaging materials considered is clearly seen in the Court's opinion in the *du Pont* cellophane case.

An excellent analysis of the proper application of the "line of commerce" test is found in *United States* v. *Guerlain, Inc.*, 155 F. Supp. 77 (D. C. S. D. N. Y., 1957) probable jurs. noted 355 U. S. 937, 951, judgments vacated for consideration of United States' motion to dismiss 358 U. S. 915 (1958). In that action it was alleged that certain French manufacturers and American distributors of perfumes had registered the trade-marks of various perfumes in the name of the American distributors in order to monopolize the American market for those brands. The Court heard evidence that many perfume manufacturers were able to virtually duplicate the fragrances of their competitors and that the average person would not distinguish between the two scents. On the other hand, it was shown that in fact the most important element in successful marketing of name brand perfumes is the establish-
[fol. 105] ment of a demand for the name, rather than the odor. The Court concluded:

> Objectively, the products may be more than reasonably interchangeable with others. But the lack of

> objectivity in consumer demand impairs the basis of interchangeability and negates a finding of cross-elasticity.

The Court distinguished that situation, wherein consumer demand is for a name, with the motives of the manufacturers in the *du Pont* cellophane case, who:

> Were guided by careful and objective considerations of utility and price. . . . Thus, small variations in price or quality would induce a manufacturer to shift from one flexible packaging material to another, in accordance with a balance of all the utilities toward the achievement of the most efficient economic operation.

A converse holding, based on the interchangeability test, is found in *American Crystal Sugar Co.* v. *Cuban-American Sugar Co.*, 152 F. Supp. 387 (D. C. S. D. N. Y., 1957) aff'd 259 F. 2d 524 (C. A. 2, 1958). There the court held refined sugar generally to be a line of commerce, whereas it had been contended that cane sugar and beet sugar were separate lines. This finding was upheld in the Court of Appeals, which noted that the two types of sugar are functionally interchangeable, notwithstanding the fact that cane sugar sells at a higher price than beet sugar, and that cane sugar has a greater public acceptance. A factor emphasized by the Court of Appeals was the sensitivity of the two types of sugar to price changes by one another.

Where does coal, as a boiler fuel, fit into this pattern? The Supreme Court has taken judicial notice of the competitive nature of fuels generally. *West Ohio Gas Co.* v. *Public Utilities Commission*, 294 U. S. 63, 72 (1935). This should be some indication that boiler fuels as a class are a line of commerce.

Application of the interchangeability test convinces me that there exists such a degree of cross-elasticity between coal and other boiler fuels as to constitute boiler fuels the relevant line of commerce in this case. Each of the boiler fuels—coals, oil, gas and atomic energy—is utilized in the same manner to produce the same result. As each

is consumed power is produced to drive the generators [fol. 106] which in turn produce electric energy. The public demand being satisfied is for electric energy and the boiler fuel being utilized in the production thereof is not a material factor influencing the consumers' market.

What is presented here is the instance of a producer guided by careful and objective considerations of utility and price striving to achieve the most efficient economic operation, as in the *du Pont* case, rather than an instance of a non-objective consumer market, as in the *Guerlain* case. It is clear from this record that Tampa is basically concerned with factors of economic utility in its operation, as it is considering conversion of other oil burning units and expansion into the field of atomic energy as a source of power. Such decisions are motivated by a desire to render the best possible service at the lowest practical rates, while realizing a reasonable profit.

The factor of price sensitivity is also present in this case. Following the initial use of coal by Tampa its oil suppliers offered to reduce prices in order to meet the challenge of the new fuel.

I find that coal, oil, gas and atomic energy meet the interchangeability test and are components of the general line of boiler fuels. This contract, relating only to coal, cannot establish a monopoly in a "line of commerce" within the meaning of the Clayton Act, and accordingly cannot be violative thereof.

Even if coal is deemed to be the relevant line of commerce that alone does not establish a violation of the Clayton Act by this contract. In order that a requirements contract come within the terms of the Act its effect must be "to substantially lessen competition or tend to create a monopoly in any line of commerce." Requirements contracts are not per se illegal. *United States* v. *Columbia Steel Co.*, 334 U. S. 495, 524 (1948); *United States* v. *Bausch & Lomb Optical Co.*, 321 U. S. 707, 728-9 (1944). Cf. *Federal Trade Commission* v. *Curtis Publishing Co.*, 260 U. S. 568 (1923); *Beloit Culligan Soft Water Co.* v. *Culligan, Inc.*, . . . F. 2d . . . (C. A. 7, 1959). This fact was tacitly admitted in the *Standard Oil* decision, when it was recognized that:

> Requirements contracts, on the other hand, may well be of economic advantage to buyers as well as to sellers and thus indirectly of advantage to the consuming public. 337 U. S. 293, 306.

[fol. 107] See dissenting opinion of Justice Frankfurter in *Federal Trade Commission* v. *Motion Picture Advertising Service Co.*, 344 U. S. 392, 402 (1953).

What were the actual monopolistic consequences of this single contract? At the time it was entered into, in the entire State of Florida only 792,000 tons of coal were being consumed annually. It was conceded that within a short period of time the Gannon Station would be using amounts in excess of that to satisfy its requirements.

Looking only at those two figures the contract would appear, in fact, to have created a situation of monopoly in favor of the seller in Florida. However, it was also conceded that as a result of this contract Tampa became the only substantial consumer of coal in Florida. Further, at the time the contract was entered into coal accounted for less than 6% of the fuel consumed in the entire State of Florida, and every power-generating unit in Peninsular Florida burned oil in its boilers.

Tampa services an area of approximately 1,700 square miles covering only 3% of the total land area of Florida. Within that area resides approximately 11% of Florida's population.

Any monopoly which seller enjoys extends only to that area serviced by Tampa. Competition has not been foreclosed by this contract for the coal business of the utilities serving the remaining 97% of the state embracing the 89% of the population residing therein. I do not consider this evidence to fall within the area of economic inquiry rejected as irrelevant by the Supreme Court in *Standard Oil of California* v. *United States*, 337 U. S. 293 (1949). In that case it was urged that in fact competition had flourished as a result of the contracts under attack. The Court said that in light of the fact that Standard Oil had 8,000 exclusive dealing contracts with 16% of the retail outlets selling 6.7% of all gasoline in a seven state area such evidence could not overcome the natural ten-

dency of the contracts to substantially lessen competition and should not be considered. That situation is so far removed from the one at bar that I cannot consider the holding to militate against consideration of the market left free for competition after this contract.

It may be contended that this circumstance is too speculative and founded upon a mere possibility that other utilities may convert to the use of coal. In answer to that [fol. 108] it need only be observed that prior to this contract Tampa was not a coal consumer, but that it made the change. It is not unreasonable that now, once coal in any significant quantity has been introduced into the Florida market, other utilities may follow suit. They are a presently existing potential market. The choice of conversion is up to them, as it was to Tampa, prodded perhaps by sales promotion on the part of coal companies wishing to acquire their business.

I cannot consider a single contract with a single utility serving only 3% of the land area and 11% of the population of a single state as "substantially lessening competition or tending to create a monopoly." The remainder of the utilities throughout the state are a potential market for free competition. If they choose not to deal in the commodity covered by the contract, for reasons of their own, that should not operate to invalidate the one contract already entered into.

Any contract of sale, to some degree, lessens competition, as it takes the particular buyer out of the competitive market for the commodity contracted for. But the Clayton Act requires more than that—the lessening must be substantial, and substantiality is lacking where 89% of the potential consumers of a product in a state are free to deal among all who sell it. Cf. *Excelsior Motor Mfg. & Supply Co.* v. *Sound Equipment, Inc.*, 73 F. 2d 725 (C. A. 7, 1934), cert. denied 294 U. S. 706 (1935).

Appellee has not cited any authority in which a single contract of such limited application as that under consideration has been held to violate the anti-trust laws. Indeed, in the prior decisions either or both of two elements, each of which is absent herein, existed.

This contract in no way resembles the so-called "tying agreements" where the owner of a patented product attempts to extend his patent monopoly by requiring the buyer to purchase non-patented articles also, *International Salt Co.* v. *United States*, 332 U. S. 392 (1947); *International Business Machines* v. *United States*, 298 U. S. 131 (1936); *Oxford Varnish Corp.* v. *Ault & Wiborg Corp.*, 83 F. 2d 257 (C. A. 6, 1936); *Radio Corp. of America* v. *Lord*, 28 F. 2d 257 (C. A. 3, 1928); *United States* v. *Linde Air Products Co.*, 83 F. Supp. 978 (D. C. N. D., Ill., 1949); or where the seller had such market domination over a non-patented article as to be able to require the purchase [fol. 109] of a "tied" product with it. *Northern Pacific Railway Co.* v. *United States*, 356 U. S. 1 (1958); *Judson L. Thomson Mfg. Co.* v. *Federal Trade Commission*, 150 F. 2d 952 (C. A. 1, 1945), cert. denied 326 U. S. 776 (1945); *Signode Steel Strapping Co.* v. *Federal Trade Commission*, 132 F. 2d 48 (C. A. 4, 1942); *United States* v. *American Can Co.*, 87 F. Supp. 18 (D. C. S. D. Cal., 1949).

Those cases not involving tying agreements had the other principal element not found here—an actual monopoly in the relevant market. In *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346 (1922), the seller controlled 40% of the nations 52,000 pattern agencies by exclusive contract. In *Fashion Originator's Guild* v. *Federal Trade Commission*, 312 U. S. 457 (1941), the manufacturers comprising the Guild sold 38% of all women's garments wholesaling at $6.75 and up and more than 60% of those at $10.75 and up. *Dictograph Products Inc.* v. *Federal Trade Commission*, 217 F. 2d 821 (C. A. 2, 1954), cert. denied 349 U. S. 940 (1955), involved exclusive dealing contracts tying up approximately 22% of the nation's 1,000 hearing aid distributors. The seller in *Anchor Serum Co.* v. *Federal Trade Commission*, 217 F. 2d 867 (C. A. 7, 1954), had exclusive dealing contracts with 16 wholesalers including the two largest in Illinois and Iowa, which were the two largest markets for its products. While not indicating the total amounts and percentages of business involved the Court did note that *one* of Anchor's 32 competitors had made over $500,000 in sales to the Illinois and Iowa wholesalers over a three year period, which business

it lost as a result of the exclusive dealing contracts of the seller. The Pullman Co., *United States* v. *Pullman Company*, 50 F. Supp. 123 (D. C. E. D. Pa., 1943), was the sole supplier in the United States of railroad sleeping cars and car service, and had maintained that position partially by the use of exclusive dealing contracts.

Only in *Standard Oil of California* v. *United States*, 337 U. S. 293 (1949), and *United States* v. *Richfield Oil Corp.*, 99 F. Supp. 280 (D. C. S. D. Cal., 1951), aff'd 343 U. S. 922 (1952), was the enormity of the seller's position in the market such as to be considered less than dominant. But even those cases present a situation much more aggravated than herein. In the *Standard Oil* case the seller had 8,000 exclusive dealing contracts with 16% of the independent service stations in a seven state area, although [fol. 110] their sales constituted only 6.7% of the total gasoline sold. Furthermore, Standard's total sales constituted 23% of all the gasoline sold in the market. It was found in *Richfield* that 7,546 oral and written exclusive dealing contracts had been made by seller covering operations in six states and involving $43,173,000 in sales for the year 1950 alone.

Richfield was affirmed by the Supreme Court on the authority of *Standard Oil*. In this regard, it is important to note the interpretation of the *Standard Oil* decision by Justice Frankfurter, who wrote the opinion:

> In any event, in the Standard Oil case, we recognized the discrepancy in bargaining power [between seller and buyer] and pointed out that retailers might still insist on exclusive contracts if they wanted. *Federal Trade Commission* v. *Motion Picture Advertising Service Co.*, 344 U. S. 392, dissent at 402.

The importance of disparity in bargaining power in antitrust cases has been recognized by the Supreme Court. *Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 394, 611 (1953).

There was no inequality of bargaining power in this case. The seller was but one of 700 coal producers capable of serving the buyer, and was not shown to be of such size as to be capable of any economic coercion. The buyer

has not been shown to have been capable of exerting any unreasonable demands in its own behalf. For all that appears, the contract was freely negotiated, and a fair reading of it gives one the impression that it was equitable to both parties in all material regards.

The seller would have the Court impose extra-judicial sanctions not provided by Congress to relieve it of its contractual obligations. If this is permitted without the utmost caution, the door may open wide to inconsequential allegations of anti-trust violations in every action on a contract of any substantial magnitude. While this might be good for anti-trust lawyers, it is doubtful whether it would be of much benefit to anyone else. It would certainly have a tendency to clog the courts with protracted litigation. Although this might put an end to anti-trust violations, it could, as Justice Jackson pointed out in *Bruce's Juices*,[9] have a devastating effect upon all business.

I would reverse the decision below.

[fol. 111] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 112]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING CERTIORARI—June 27, 1960

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

---

[9] 330 U. S. 743, 754 (1947).

ILE COPY

Office-Supreme Court, U.S.
FILED
MAY 12 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. ~~937~~ 87

TAMPA ELECTRIC COMPANY,
Petitioner,

v.

NASHVILLE COAL COMPANY, NASHVILLE COAL, INC. and WEST KENTUCKY COAL COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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May 12, 1960

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Sherman Act, Section 1, 26 Stat. 209, 15 U. S. C. §1 ..... 4, 27

Miscellaneous:

H. R. Rep. No. 627, 63rd Cong., 2d Sess. (May 6, 1914) 17

51 Cong. Rec. 16145 (1914) 24

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No.

TAMPA ELECTRIC COMPANY,

Petitioner,

v.

NASHVILLE COAL COMPANY, NASHVILLE COAL, INC. AND WEST KENTUCKY COAL COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Tampa Electric Company[1] prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered on April 4, 1960 in a proceeding entitled *Tampa Electric Company v. Nashville Coal Company, et al.*

Opinions Below

The opinions of the United States Court of Appeals for the Sixth Circuit are printed as Appendix A hereto. They have not yet been officially reported. The opinion of the

1. Referred to herein as "petitioner" or "buyer".

United States District Court for the Middle District of Tennessee, Nashville Division, rendered on November 18, 1958, is printed as Appendix C hereto. It is officially reported at 168 F. Supp. 456.

Jurisdiction

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on April 4, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1) and 2101(e).

Question Presented

Can a seller which has entered into a contract to furnish a limited and defined portion of an electric utility company's fuel requirements for a period of 20 years at a designated price, which was economically necessary to and desired by both parties at the time it was entered into, and which the purchaser now wishes to enforce, repudiate its obligations on the alleged ground that the contract violates Section 3 of the Clayton Act?

Statute Involved

Section 3 of the Clayton Act; 15 U.S.C. § 14:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or under-

standing that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce." Oct. 15, 1914, c. 323, § 3, 38 STAT. 731.

Statement

This petition seeks review of a judgment of the United States Court of Appeals for the Sixth Circuit affirming a judgment of the United States District Court for the Middle District of Tennessee, Nashville Division, which granted respondents' motion, and denied petitioner's cross-motion, for summary judgment. The action, which was commenced by petitioner on September 3, 1957, sought a declaratory judgment that a contract dated May 23, 1955 to supply coal to petitioner, which had been repudiated by respondents, was valid and enforceable. The basis for federal jurisdiction in the District Court was 28 U.S.C. §§ 1332[2] and 2201. The plaintiff, Tampa Electric Company, was (and is) a Florida corporation; defendant Nashville Coal, Inc., a Kentucky corporation; defendant West Kentucky Coal Company, a New Jersey corporation; and defendant Nashville Coal Company, a Tennessee corporation until its dissolution in 1956. In addition to this diversity of citizenship between the plaintiff and each of the defendants, the amount in controversy exceeded, exclusive of interest and costs, the sum of $3,000.

2. 62 STAT. 930 (1948), *as amended by* 70 STAT. 658 (1956).

In their answer before the District Court, respondents admitted the execution of the contract and their refusal to perform their obligations thereunder, but alleged that the contract was void and unenforceable on the ground that it violated Section 3 of the Clayton Act and Sections 1 and 2 of the Sherman Act. Thereupon respondents filed a motion for summary judgment, and petitioner filed a cross-motion seeking the same relief. District Judge William E. Miller granted respondents' motion for summary judgment, and denied petitioner's cross-motion, on the ground that the material facts were not in dispute and established the illegality of the contract under Section 3 of the Clayton Act. The Court thereupon entered judgment declaring the contract illegal, void and unenforceable. Petitioner appealed to the United States Court of Appeals for the Sixth Circuit, which affirmed the District Court (Weick, J. dissenting).

Facts

Since there is no dispute as to the facts, and they are clearly and succinctly set forth in the majority's opinion below, we believe it would be a convenience to the Court if we adopt that statement as our own:

> "Appellant [petitioner] is an electric public utility serving the city of Tampa, Florida, and neighboring communities. The appellees [respondents] are engaged in mining and selling coal.
>
> "In 1954 appellant operated two integrated generating plants, both located on Tampa Bay, Florida, at which there were eleven generating units, all of which burned oil. In that year, in order to meet the increasing demand for electric energy in its service area, appellant decided to expand its facilities and build a new and additional integrated generating station on Tampa Bay, to be known as the Francis J. Gannon Station, at which it was planned to ultimately install six generating units.

"The May 23, 1955, contract [the contract at bar] was for the purchase of coal for use at the Gannon Station. It was entered into between the appellant as the buyer and the Potter Towing Company, a Tennessee partnership of David K. Wilson and Justin Potter, as the seller. Subsequent to the making of the contract, the interest of Wilson and Potter was transferred to the appellee Nashville Coal Co. and thereafter to the appellee Nashville Coal, Inc., which is a wholly owned subsidiary of the appellee West Kentucky Coal Company. The West Kentucky Coal Company guaranteed the appellant in writing against any loss or damage arising out of nonperformance of the contract.

"The contract, after stating that the seller proposed to make available for sale to the buyer large quantities of coal from the West Kentucky field near Uniontown, Kentucky, and that the buyer desired to purchase certain coal for its use in its plant to be constructed near Tampa, upon the terms and conditions thereinafter set out, provided as follows:

"'Seller agrees to provide and deliver on the dock or docks of the Buyer at Plant Gannon coal to supply the total requirements of fuel of the Buyer for the operation of its first two units to be installed at the Gannon Station and the Buyer agrees to accept and pay for such fuel as provided in Article 4 hereof, which fuel requirements shall be not less than 225,000 tons of coal per unit per year. It is further agreed that if during the first 10 years of the term of this contract the Buyer constructs additional units in which coal is used as the fuel, it shall give the Seller notice thereof two years prior to the completion of such unit or units and upon completion of same the fuel requirements thereof shall be added to this contract and be furnished by the Seller and accepted by the Buyer. It is understood that the Buyer has the option to be exercised two years prior to completion of said unit or units of deter-

mining whether coal or some other fuel shall be used in same. It is anticipated that deliveries will start approximately March, 1957 for the requirements of the first unit and that deliveries for the requirements of Unit #2 will begin when constructed.'

It also provided,

"'The term of this agreement shall be for a period of twenty years from the first day of the month in which month first deliveries are made to the Buyer.'

"The first unit of the Gannon plant commenced operation August 1, 1957; the second unit on October 29, 1958. The third unit, a coal burning unit, was under construction at the time this action was filed.

"For the appellant to equip the Gannon Station to burn coal necessitated a capital expenditure of $3,000,000.00 more than if the fuel initially chosen had been oil. To supply the appellant under this contract required a capital expenditure in excess of $7,500,000.00 by the appellees.

"In April, 1957, just before the first coal was to be delivered under the contract, the appellees advised appellant that they would not perform under the contract, which they contended was illegal and unenforceable by either party. As a result, it has been necessary for appellant to purchase its coal requirements in the market at a price substantially higher than that provided for in the contract.

"In making such arrangements it estimated that its coal requirements for its Gannon Station were approximately as follows:

Year 1958	350,000 tons
Year 1959	700,000 tons
Year 1960	700,000 tons
Year 1961	1,000,000 tons

'To increase as required to about 2,250,000 tons per year.'

"At the time the contract was entered into, coal accounted for less than 6% of the fuel consumed in the entire state of Florida. Every electric generating installation in peninsular Florida burned oil at that time. It was estimated by the buyer that within a very few years the Gannon Station would consume more coal than was presently consumed in the entire state of Florida. Peninsular Florida's coal consumption was approximately 700,000 tons per year" (App. 2a-4a).[3]

One further fact should be noted. It was conceded by respondents in the Courts below that Potter Towing Company, the original contractor, which was but one of some 700 coal producers who were not only able but "eager" to supply petitioner's requirements, had no such economic leverage vis-a-vis petitioner as to enable it to insist upon the "requirements" provision (R. 57a, R. 1b). Obviously if petitioner had not desired that provision, it could have purchased its coal on other terms from any one of Potter's competitors. Actually, respondents have asserted that it was petitioner, the purchaser, and not respondents which had the economic leverage to insist on that provision (R. 57a).

Decision of the Court of Appeals

The majority of the Court below sustained the District Court, holding that the contract violated Section 3 of the Act and was therefore unlawful and unenforceable by either the buyer or the seller. As we read the opinion, the Court based its decision solely on the facts that the

3. The following references will be used herein:
App. — Appendices to this petition.
R.-a — Record as printed in appendix to appellant's brief in Court below.
R.-b — Record as printed in appendix to appellees' brief in Court below.

contract used the word "requirements" and that the quantity of coal involved in the contract would soon exceed the total amount of coal presently being sold in the State of Florida, and amounted in dollar value, over the life of the contract, to over $128,000,000. Accordingly, citing this Court's decision in *Standard Oil Co. of California* v. *United States*, 337 U. S. 293 (1949) (*"Standard Oil"*), the Court held that the amount involved in the contract was "not insignificant or insubstantial" and that the contract was therefore void (App. 11a).

The Court dismissed the contention that it was plain from its legislative history that the Act was intended to apply only to practices whereby powerful sellers imposed exclusive dealing or "tying" conditions upon a substantial number of buyers for the purpose and with the effect of tying up a substantial portion of the market for the sale of their goods, on the ground that the Act in unambiguous terms referred to "a" contract of sale for "use, consumption or resale" and that this Court had held in *Standard Oil* that the Act was "applicable to a situation where the seller did not occupy a dominant economic position in the industry" (App. 5a, 6a).

Again citing *Standard Oil*, the Court held that it was immaterial that the contract contained no condition that the purchaser would not deal in the goods of the seller's competitors, since the contract did require the seller to supply the buyer's "'total requirements' for the first two coal burning units and for such other units of the Gannon Station as would be constructed as coal burning units" (App. 7a). The Court dismissed as immaterial the fact that under the contract the purchaser could, and in fact did, purchase oil, concededly a "competitive" fuel, on the ground that oil and coal are "separate defined subdivision[s] of the fuel industry generally" (App. 9a). Similarly, the Court disregarded the allegedly "remote"

possibility that the buyer might convert some of its oil burning units and purchase coal for these units from the seller's competitors, since "there is nothing to indicate that there is any planned or probable conversion" (App. 9a). Finally, citing this Court's opinion in *Kelly* v. *Kosuga*, 358 U. S. 516 (1959), the Court held that since the contract was void, the Court "will not assist either party in its enforcement" (App. 13a).

In his carefully reasoned, and, we submit, completely sound dissent, Judge Weick took issue with the majority on every point (App. 13a-35a).

Reasons for Granting the Writ

As we read the Act, its statutory history, and the Court decisions construing and applying it, it is indisputable that it was designed and has heretofore been construed solely to prohibit various devices whereby powerful sellers, through the economic leverage derived from their control of a desirable and unique product, attempt to pre-empt the market for their product by selling it only on the condition that the purchaser will not deal in the goods of the seller's competitors. But the decision below has converted the Act into a statute outlawing any contract whereby a manufacturer contracts for the supply of a part of its requirements of fuel, raw materials or other necessities for a term of years whenever the quantity of goods involved is not insubstantial. Specifically, we submit that the decision below is unprecedented and erroneous in the following respects:

1. This is the first time the Act has been applied to a contract for the sale of a limited portion of a buyer's requirements, which neither expressly nor in effect prohibits the purchaser from dealing in the goods of the seller's competitors.

2. This is the first time the Act has been applied when it was conceded that the seller had no economic leverage enabling it to impose an exclusive dealing condition upon the buyer, and where, concededly, it did not do so.

3. This is the first time the Act has been applied to an isolated contract for the sale of a part of the requirements of one of many thousands of potential customers of the seller and its competitors.

4. This is the first time it has been held that the effect of a contract for the sale of goods may be to substantially lessen competition or tend to create a monopoly when the actual effect of the contract was to introduce competition with an existing monopoly and compel it to reduce its prices.

5. This is the first time it has been held that the sole criteria of illegality under Section 3 are that the contract uses the word "requirements" and that the volume of goods involved is substantial.

6. This is the first time a seller has been permitted to avoid its contractual obligations on the alleged ground that it has itself violated the Act. In this respect the decision below is in direct conflict with the almost contemporaneous decision of the United States Court of Appeals for the Seventh Circuit in *Beloit Culligan Soft Water Service, Inc.* v. *Culligan, Inc.*, 274 F. 2d 29 (7th Cir. 1959).

7. An examination of the opinion below will further disclose that each of the above propositions is said to be supported by the decision of this Court in *Standard Oil*. In our view, the Court below has completely misconstrued this Court's opinion in that case.

We respectfully submit that the propositions established by the decision below are so novel, and so drastic

in their potential effect on the business and economic life of the country, that it is in the public interest that this Court review that decision now, and thus put at rest the many doubts which it casts on the meaning and effect not only of the Act itself but of this Court's decision in *Standard Oil*. For in effect the decision below outlaws, or at least raises the gravest questions as to the legality of, any contract for the purchase or sale of a substantial volume of goods over a term of years. If that be the law, the wheels of industry in this country will be quickly brought to a standstill.

ARGUMENT

I

The contract at bar does not come within the language of Section 3 of the Clayton Act.

As is clear on its face, and is conceded by the majority below, the contract at bar does not contain any "condition, agreement or understanding" that the buyer will not use or deal in the goods of the seller's competitors. The majority below contends, however, that this is immaterial, since the contract covers the buyer's "'total requirements' for the first two coal burning units and for such other units at the Gannon Station as would be constructed as coal burning units" (App. 7a).

We submit that this proposition is manifestly untenable. For concededly the buyer is free at all times to buy coal, oil or any other fuel from the seller's competitors for use in any of the 11 presently oil burning units at the buyer's two other integrated stations on Tampa Bay, or in any new plant it may elect to construct. Furthermore, if the demands for additional electricity require the buyer to construct additional units at Gannon Station itself, the buyer is free to burn oil, gas or any other competitive fuel in such units. It is only if the buyer determines to con-

struct additional coal burning units at Gannon during the first ten years that the contract requires it to purchase its additional coal requirements from respondents. After ten years, the buyer is free to purchase coal from the seller's competitors even for use in any additional coal burning units thereafter constructed at Gannon.

The majority below sought to meet these incontrovertible facts first by asserting that there was no present plan for the conversion of any oil burning units to coal, and that therefore the exercise of petitioner's right to purchase coal from the seller's competitors for such units was so "remote" as to be "immaterial" (App. 9a). The significance of this assertion escapes us. Since the buyer has the right to deal in the goods of the seller's competitors, the contract cannot be based upon the condition that it will not do so. It is irrelevant whether the buyer has any present plans to exercise that right.

But in any event, the record affirmatively discloses that since the commencement of this very litigation, Peabody Coal Company, an immediate and direct competitor of respondents, offered to furnish coal for two of petitioner's oil burning units if petitioner would convert them to coal (R. 42a-54a). The obvious reason why this offer was not accepted is that petitioner's oil suppliers reduced the price of their oil so as to meet this threat of competition (R. 56a). Thus, as Judge Weick pointed out, "such possible conversion is not as remote as was claimed" (App. 22a). It is also clear that the contract, far from foreclosing the seller's competitors, engendered active competition among them for the buyer's trade.

Secondly, although conceding that "coal and oil are competitive fuels", the Court below concluded that "for the purposes of Section 3 • • • each is to be treated as a separate, defined subdivision of the fuel industry generally" (App. 9a). Accordingly, as the present contract deals only with coal, the Court held it was irrelevant that

the buyer could purchase oil for its oil burning units. It seems to us that this is a very novel, and we think, untenable method of showing that the contract at bar is based upon a condition that the buyer will not deal in the goods of the seller's competitors. The buyer is engaged in producing electricity for resale to the public at three integrated plants situated around the periphery of Tampa Bay. We submit that as it is free to burn oil (or coal) in any of these integrated units, the contract does not prevent it from dealing in the goods of the seller's competitors.[4]

Thus, the present contract is totally different from the requirements contracts held unlawful by this Court in *Standard Oil*, on which the majority below relies. There, the filling stations were required to purchase *all* their requirements of gasoline from the seller, however much their requirements might increase in the future. As this Court pointed out, "• • • the very existence of such contracts denies dealers opportunity to deal in the products of competing suppliers and excludes suppliers from access to the outlets controlled by those dealers". *Standard Oil*, 337 U. S. at 298. Here, on the contrary, as the buyer's demands increase, the buyer is free at all times to determine whether to purchase additional coal under the contract or whether to purchase other fuels from the seller's competitors, and, of course, it can currently purchase coal (if that be the relevant "subdivision of the fuel industry") from the seller's competitors for use in its other stations.

4. In any event, as pointed out by Judge Weick (App. 24a-29a), it is plain from this Court's recent decisions, particularly *United States v. E. I. duPont de Nemours & Co.*, 351 U. S. 377 (1956) (the so-called "cellophane case"), that where, as here, we are dealing with boiler fuels, coal cannot "be treated as a separate, defined subdivision of the fuel industry generally."

Under these circumstances, we submit that the present contract more closely resembles a contract for a fixed quantity than the type of "requirements contract" held unlawful by this Court in *Standard Oil*. Indeed, we think this is apparent from a mere reading of the attempt of the majority below to meet this contention:

> "There is also an important difference between a 'requirements' contract and a contract which calls for the purchase of a definite quantity over a period of time which the buyer estimates to be sufficient to meet his requirements. As pointed out in *United States* v. *Standard Oil Co.*, 78 F. Supp. 850, 867, S.D. Cal., when a dealer agrees to take a specific amount of a product, there is a likelihood that he may, by reason of unexpected shortages or increased demands, use competitive products, and competitors thus will have the opportunity of putting their products into competitive use by the buyer, with the ultimate result of inducing the buyer to handle their products. Under a 'requirements' contract for a long period of time this chance is, for all practical purposes, cut off. As stated by the Supreme Court in *Standard Oil Co. of California* v. *United States*, supra, 337 U. S. 293, 314, 'It cannot be gainsaid that observance by a dealer of his requirements contract with Standard does effectively foreclose whatever opportunity there might be for competing suppliers to attract his patronage, * * *'" (App. 8a).

We heartily agree with this statement, but we are in total disagreement with the Court's apparent view that it supports its thesis that the contract at bar is similar to the requirements contracts held unlawful in *Standard Oil*. On the contrary, it seems to us to prove exactly the opposite. For, as we have seen, the more the demands on petitioner increase, the freer it is to purchase coal or other fuels

from the seller's competitors. Thus this contract lacks the very element which made the requirements contracts in *Standard Oil* identical with straight exclusive dealing contracts.

The purpose and effect of the "requirements" provision in the contract at bar is not to prevent the buyer from dealing with the seller's competitors, as it was in the contracts before the Court in *Standard Oil*. Its purpose and effect is simply to provide for the fact that it is impossible to ascertain in advance the exact amount of coal which a given unit will burn, and to give the flexibility necessary to meet seasonal fluctuations in the use of electricity. Within the limits of the actual capacity of the units involved, the quantity is fixed.[5] Thus, for all practical purposes, it is identical with a contract for a fixed amount (which concededly does not come within Section 3) rather than with a full requirements contract, such as those involved in *Standard Oil*.

We submit it is incontrovertible that the present contract is not a "contract for sale • • • on the condition, agreement, or understanding that the • • • purchaser thereof shall not use or deal in the goods • • • of a competitor or competitors of the • • • seller," and therefore does not come within the language of Section 3.

II

The contract at bar does not come within the purpose and intent of Section 3.

It seems to us that the conclusion of the majority below stems in part from its refusal to consider the legislative history of the Act. Even a cursory examination of

5. The record affirmatively shows that the units of Gannon Station have a known generating capacity, which requires a quantity of fuel ascertainable in advance to within approximately 5% (R. 42a).

that history[6] incontrovertibly confirms Judge Weick's conclusion in his dissenting opinion below that it is "all too clear that what Congress was aiming at was monopolistic practices of powerful sellers in the distribution of goods whereby the dealer or buyer was prohibited from dealing in the goods of the seller's competitors," and that "read in the light of its legislative history, the Clayton Act was never intended to vitiate a requirements contract made by a single public utility to insure a continuing supply of boiler fuels at a constant price" (App. 17a, 21a).

Specifically, the practices condemned by Congress were based on the use of two types of contracts, commonly known as "tying" agreements and "exclusive dealing" agreements. A "tying" agreement is one where the seller, having control of a unique and desirable article, either through a patent or a dominant position in the market, refuses to sell or license the use of the article to a retailer or manufacturer unless the buyer agrees also to buy from the seller other articles which he may need in his trade, and which the seller can supply. In other words, the right to use other articles is "tied" to the right to use the patented or controlled article. An "exclusive dealing" agreement is one whereby a seller exerting similar economic leverage exacts the purchaser's agreement, as a condition to the right to purchase the desired article, not to deal in any similar and competing articles that might be offered by the seller's competitors.

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6. Since in its opinion in the *Standard Oil* case, upon which the Court below places its principal reliance, this Court not only discussed that legislative history a number of times (see 337 U. S. at 297, n. 4, 307, n. 10, and 312, text and n. 15), but considered it so important that the opinion was amended to correct an error which the Court had made in describing it (338 U. S. 808 (1949)), we will not burden the Court here with a lengthy discussion of that subject. For the Court's convenience we have annexed hereto as Appendix E a presentation of what we consider to be the more pertinent extracts.

In other words, Congress was concerned with attempts by powerful sellers to monopolize the market for the sale of their goods.

When the language of the Act is read in the light of the Congressional intent, we think it becomes perfectly clear that the words used are both apt and appropriate to describe the particular practices which Congress was attempting to prevent. In the first place, we submit that the natural implication of the words "It shall be unlawful • • • to • • • make a sale • • • or fix a price charged therefor, or discount from, or rebate upon, such price, *on the condition* • • • that the • • • purchaser thereof *shall not* • • •" is that it is unlawful for *a seller*[7] to *impose* the condition upon a buyer. One would not normally use that language to describe a simple contract for the supply of a single consumer's fuel requirements, which was economically necessary for and therefore desired by both parties.

Similarly, we think it is plain that the words, "where the effect of such • • • contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce" must be construed as referring only to an attempt to lessen competition or create a monopoly in the "relevant market"—i.e. the market in which the seller and its competitors can normally sell their goods.[8] Otherwise, the language is mere surplusage: If the purpose of the Act were to provide that any contract such as that at bar, whereby a buyer and seller, dealing at

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7. That the Act is directed solely at sellers is indubitably shown by the fact that, as originally adopted by Congress, the Act made it a crime for a seller to impose such a condition. H. R. Rep. No. 627, 63rd Cong., 2d Sess., 2 (May 6, 1914).

8. Obviously, petitioner is not a "market." It is but one of the many thousands of potential customers to whom respondents and their competitors could sell coal or other fuels.

arm's length and with equal bargaining power, agree, each for its own business reasons, that the seller will furnish all the buyer's requirements, shall be unlawful whenever the volume of goods covered by the contract is substantial (which is the inescapable conclusion from the decision below), the Act need merely have recited that "any contract for the sale of a substantial quantity of goods over a term of years shall be unlawful." For manifestly, every contract for the sale of goods forecloses the buyer *pro tanto* from dealing in the goods of the seller's competitors and thus ends competition and creates a monopoly for the sale of *those* goods to *that* buyer.

If the meaning of the Act were that such a contract of sale becomes unlawful whenever it can be shown that the volume of goods involved is "not insubstantial," it would follow that every substantial contract for the sale of goods would be unlawful. That was not the intent or purpose of Congress in enacting Section 3, and we submit that there is nothing in the language used by Congress requiring so strained and incongruous a construction.[9] We need not stress the catastrophic effect upon the business life of the country that would follow if such a construction were permitted to stand.

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9. The majority below concluded that simply because it "expressly refers to *'a'* contract for sale 'for *use*, consumption or resale' " (App. 5a) Section 3 of the Act was clearly applicable to a situation such as that at bar. But when these words are considered in the light of the expressed Congressional purpose, it becomes apparent that these words were necessary in order to carry out that purpose. If a single contract were not made unlawful, the Act would not have reached a single contract with a chain-store company covering a substantial segment of the market, and if the Act had not referred to contracts of sale for "use" and "consumption", the Act would not have been effective to reach tie-in contracts with small manufacturers such as those entered into by United Shoe Machinery Company with the shoemakers of the country—the particular practice which, as the legislative history shows, gave rise to the controversy resulting in

III

The contract at bar does not come within the purview of any prior decision outlawing a contract under Section 3.

In the Courts below, respondents relied upon nine cases outlawing "tying" contracts[10] and ten cases outlawing "exclusive dealing" contracts.[11] An examination of these cases will show that each one of them deals with some variation of the specific practices which Congress had regarded as objectionable when it adopted Section 3:

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the adoption of Section 3. Thus, the use of these words was both necessary and appropriate to carry out the Congressional intent. They need not, and therefore should not, be so construed as to extend the coverage of the Act to a family of contracts never contemplated by Congress.

10. *Northern Pacific Railway Co.* v. *United States*, 356 U. S. 1 (1958); *International Salt Co.* v. *United States*, 332 U. S. 392 (1947); *International Business Machines Corp.* v. *United States*, 298 U. S. 131 (1936); *Judson L. Thomson Mfg. Co.* v. *Federal Trade Commission*, 150 F. 2d 952 (1st Cir. 1945), *cert. denied*, 326 U. S. 776 (1945); *Signode Steel Strapping Co.* v. *Federal Trade Commission*, 132 F. 2d 48 (4th Cir. 1942); *Oxford Varnish Corp.* v. *Ault & Wiborg Corp.*, 83 F. 2d 764 (6th Cir. 1936); *Radio Corporation of America* v. *Lord*, 28 F. 2d 257 (3rd Cir. 1928); *United States* v. *American Can Co.*, 87 F. Supp. 18 (N. D. Cal. 1949); *United States* v. *Linde Air Products Co.*, 83 F. Supp. 978 (N. D. Ill. 1949).

11. *Standard Oil Co. of California* v. *United States*, 337 U. S. 293 (1949); *Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U. S. 457 (1941); *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346 (1922); *Anchor Serum Co.* v. *Federal Trade Commission*, 217 F. 2d 867 (7th Cir. 1954); *Dictograph Products, Inc.* v. *Federal Trade Commission*, 217 F. 2d 821 (2d Cir. 1954), *cert. denied*, 349 U. S. 940 (1955); *Dole Refrigerating Co.* v. *Kold-Hold Mfg. Co.*, 185 F. 2d 809 (6th Cir. 1950); *McCullough* v. *Kammerer Corp.*, 166 F. 2d 759 (9th Cir. 1948), *cert. denied*, 335 U. S. 813 (1948); *National Lockwasher Co.* v. *George K. Garrett Co.*, 137 F. 2d 255 (3rd Cir. 1943); *United States* v. *Richfield Oil Corp.*, 99 F. Supp. 280 (S. D. Cal. 1951), *aff'd per curiam*, 343 U. S. 922 (1952); *United States* v. *Pullman Co.*, 50 F. Supp. 123 (E. D. Pa. 1943).

In each case the contract either contained an express "tying" condition, or prevented the buyer from buying *any* of the products involved in the contract from the seller's competitors; in each case the seller, through the ownership or control of a particularly desirable article of commerce, had sufficient economic leverage vis-a-vis the buyer to enable it to impose the exclusive dealing or tying condition[12]; in each case the Court was confronted with a practice whereby the seller imposed such conditions on a substantial number of customers, and the principal question decided by the Court was whether the effect of the contract was to substantially lessen competition or tend to create a monopoly in the market available to the seller and its competitors for the sale of their goods. Finally, in each case, the decree of the Court was directed exclusively against the seller and never against the buyer.

Respondents have not cited a single case and we believe they cannot cite any case in which the Act has been applied to a contract which did not in fact prevent the buyer from dealing with the seller's competitors, where the seller had no economic leverage vis-a-vis the buyer and where the contract represented an isolated commercial transaction having no substantial effect upon the market for the seller's goods. Thus, the Courts have never before applied the Act except in the manner intended by Congress, and never under circumstances even remotely resembling those at bar.

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12. It is true that in some cases, such as *Standard Oil*, it was argued that the buyers also desired the exclusive dealing condition. However, as Mr. Justice Frankfurter pointed out in his dissenting opinion in *Federal Trade Commission* v. *Motion Picture Advertising Service Co.*, 344 U. S. 392, 402 (1953) "* * * in the *Standard Oil* case we recognized the discrepancy in bargaining power [between buyer and seller] and pointed out that the retailers might still insist on exclusive contracts if they wanted."

IV

The decision below outlaws every substantial contract for the supply of a single consumer's requirements of raw materials.

As has been seen, we believe that the inescapable conclusion from the logic of the decision below is that any contract for the purchase of a substantial volume of goods, even though the quantity be fixed by the contract, is unlawful. It is true that the Court below sought to distinguish the contract at bar from a contract for a fixed quantity, but as we pointed out at pages 14 and 15, *supra*, we think the Court's attempted distinction proves that, on the contrary, it is indistinguishable. Certainly, as long as the decision stands, we doubt if any responsible lawyer could advise his client that a contract for the purchase of a substantial volume of goods was beyond the reach of Section 3 of the Clayton Act.

But even if the Court's attempted distinction were valid, the decision below is certainly applicable to any contract for the supply of a single consumer's "requirements," even though desired by the buyer, and regardless of whether it has any substantial effect upon the available market for the seller's goods. We think we have demonstrated above that as a matter of law such a result is neither necessary nor consistent with the language of Section 3 when read in the light of the Congressional intent. We shall now show that from an economic standpoint such a result would not only do violence to the obvious and expressed intent of Congress, but would do grave damage to the economic life of the country.

This Court has had several occasions to consider the economic effect and necessity for contracts whereby industrial consumers make provision for their fuel requirements

for a long term of years. For example, as long ago as 1931, in *Twin City Pipe Line Co.* v. *Harding Glass Co.*, 283 U. S. 353, 358 (1931) this Court held that such a contract "• • • does not subject the Glass Company [the buyer] to, or tend in any manner to impose upon the public, any wrong, disadvantage or evil attributable to monopoly or restraint of trade." More recently, in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U. S. 332, 344 (1956), in holding that the Natural Gas Act had not outlawed long-term contracts for the supply of a utility company's requirements of natural gas, this Court pointed out:

> "• • • Conversion by consumers, particularly industrial users, to the use of natural gas may frequently require substantial investments which the consumer would be unwilling to make without long-term commitments from the distributor • • •."

On the basis of that decision the Court also approved a 15-year contract for the supply of a public utility's requirements of electric power. *Federal Power Commission* v. *Sierra Pacific Power Co.*, 350 U. S. 348 (1956).

Similarly, the Federal Power Commission, with the approval of the United States Court of Appeals for the District of Columbia, has recently found such contracts economically necessary, and has insisted that, before a certificate of public convenience or necessity could be granted to a pipe line company to build a pipe line to supply gas to peninsular Florida, the seller should enter into binding 20-year requirements contracts with its major prospective customers. *In the Matter of Houston Texas Gas and Oil Corp. and Coastal Transmission Corp.*, 16 F.P.C. 118 (1956), *aff'd sub nom. Florida Economic Advis. Coun.* v. *Federal Power Commission*, 251 F. 2d 643 (D.C Cir. 1957).

It is true that in these cases no question of a violation of Section 3 was raised and that each dealt with a regulated "natural monopoly." We cite them primarily as illustrative of the economic background and necessity of a contract such as that here involved, and secondly, to point out that if the decision below were allowed to stand, grave doubt would be cast as to the legality of those contracts.

The record discloses that, economically speaking, a long-term requirements contract was just as necessary to both the buyer and seller in the case at bar as it was in the cases above cited, if any business transaction between them was to take place at all. Just as it was necessary to have a requirements contract satisfactory to the Ideal Cement Company before it would erect a gas burning cement plant in Mobile, Alabama (see 350 U. S. at 336), so was it necessary for petitioner, particularly because it is a regulated public utility, to make firm and adequate provision for its future supplies of coal before it embarked upon the construction of a coal burning plant, at a cost of over $3,000,000 more than it would have cost to build an oil burning plant (R. 43a).

Similarly, the position of the sellers under the contract at bar was almost identical with that of the natural gas pipe line company in the case last cited: As noted by the Court below (App. 4a), the respondents have made an investment of over $7,500,000 in making preparation for the shipment of the coal involved in the contract from Uniontown, Kentucky, to petitioner's dock at Tampa, Florida (see R. 43a), just as the Houston Texas Gas and Oil Corp. had to build a pipe line in order to serve its

customers in eastern Florida. Such investments can not be safely made without long-term commitments.[13]

This of course is substantially true in any situation where a utility company, manufacturer or other industrial consumer is arranging for the supply of the raw materials needed in its plant. It is always good business for such a consumer to make adequate and reliable arrangements for its future requirements at a price which it believes to be advantageous, and if a substantial investment must be made by either buyer or seller to carry out the contract, a long-term contract is an economic necessity.

Thus the contract at bar is not unique or unusual. It is merely an example of the normal, simple and economically sound method by which consumers of substantial quantities of raw material in the manufacturing process customarily arrange for their supplies. We have no doubt that there are thousands of such contracts in this country. Congress never intended to outlaw such arrangements, for they involve none of the evils which Congress was attempting to prevent when the Act was under consideration. Moreover, we submit that Congress could not reasonably be expected to have so intended. For it is self-evident that the economic consequences on the business life of this country resulting from outlawing all such arrangements would be incalculable.

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13. It should also be noted that one of the controlling factors which led the Federal Power Commission to insist upon 20-year requirements contracts was that gas was a newcomer attempting to break into the existing oil monopoly in peninsular Florida (16 F.P.C. at 122-23). The identical factor is, of course, equally present in the case at bar. Thus the contract at bar is also defensible on the ground that the qualifying clause was not meant to apply to such a situation. As was pointed out by Senator Walsh in explaining the qualifying clause to the Senate:

> "* * * it was found no easy task to frame a statute which would reach the case of a plundering monopolist which would not only not hamper many legitimate transactions but not be oppressive to a struggling industry contending for trade against a competitor enjoying a practical monopoly or one long established and supported by unlimited capital." 51 Cong. Rec. 16145 (1914).

V

In any event, the contract at bar does not "substantially lessen competition or tend to create a monopoly" within the meaning of the Act.

Even if the contract at bar did come within the meaning of the Act, we submit that it does not meet the substantiality test contained in the qualifying clause. Despite this Court's recent holding that "substantiality can be determined only in terms of the market affected,"[14] the Court below made no attempt to define a market. It merely held the contract unlawful because the estimated "total dollar pre-emption over the life of the contract at the minimum price of $6.40 per ton would amount to $128,000,000.00. This is, of course, not insignificant or insubstantial" (App. 11a). We submit that Judge Weick was correct when he dissented on the ground that:

> "I cannot consider a single contract with a single utility serving only 3% of the land area and 11% of the population of a single state as 'substantially lessening competition or tending to create a monopoly.'" (App. 31a, see R. 3b)[15]

In terms of the relevant market—whether as the Court below would have it, the market for the sale of *coal* as boiler fuel available to the respondents and their competitors (the 700 coal producers in the Ohio Valley), or, as we see it, the market for boiler fuel of any kind—the amount of coal covered by this contract is a drop in the

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14. *United States* v. *E. I. duPont de Nemours & Co.*, 353 U. S. 586, 593 (1957).

15. The fact that the amount of coal sold under the contract would soon exceed all of the coal previously sold to the entire State of Florida (App. 11a) is immaterial, since it is conceded that at the time the contract was entered into oil had virtually a complete monopoly in the Florida fuel market (App. 4a).

bucket. For that market embraces all the consumers of fuel not only in Florida but in at least the Eastern half of the United States.

Moreover, as we have seen, the immediate effect of this contract was to stimulate respondents' coal competitors to offer coal to petitioner at competitive prices for use in petitioner's oil burning units, and thus force respondents' oil competitors to reduce their prices. We suggest that it is ludicrous to say that such a contract lessens competition or tends to create a monopoly.

To show that this contract substantially lessens competition or tends to create a monopoly within the meaning of the Act it would be necessary for respondents to show that they had tied up a substantial segment of the market for boiler fuel available both to them and to their competitors. An isolated contract of sale whereby a single consumer arranges for the supply of its fuel requirements from a single supplier cannot have any such result, and therefore cannot come within the purview of the Act.

VI

The conclusion of the Court below that a seller can escape its contractual obligations by pleading its own unlawful act under Section 3 is erroneous, unprecedented, and in conflict with a recent decision of the Seventh Circuit.

The majority of the Court below held that a seller can repudiate a contract of sale which the purchaser wishes to enforce on the ground that it, the seller, unlawfully entered into the contract in violation of Section 3 of the Clayton Act. Here again the Court rewrote Section 3 to produce a result never intended by Congress, and never reached by any other court in the 45 years since the passage of the Act.

As we have seen, the sole purpose of Section 3 of the Clayton Act is the protection of buyers, as a class, from coercive action by powerful sellers. The Act by its very terms is directed only at the seller. It does not declare that any contract which contains an exclusive dealing condition shall be unlawful. It says merely that it shall be unlawful for any person to make a sale or contract of sale (*not* a purchase or contract of purchase) upon such a condition. Thus it is quite different from such statutes as the Sherman Act which declare that certain contracts are unlawful in themselves. 15 U. S. C. §1. It follows that under Section 3 it is only the act of the seller in entering into a contract of sale on the prohibited condition that is unlawful. As this Court held in the *Bruce's Juices* case,[16] remedies not authorized by a statute such as Section 3 should not be judicially added to the anti-trust laws.

Moreover, the holding of the Court below conflicts with an almost contemporaneous decision of the United States Court of Appeals for the Seventh Circuit, entered on December 15, 1959, in *Beloit Culligan Soft Water Service, Inc.* v. *Culligan, Inc.*, 274 F. 2d 29 (7th Cir. 1959). That case, like the instant case, was an action by purchasers for a declaratory judgment that a contract (a dealership franchise agreement) which defendant had with each of the purchasers was legal and enforceable. The agreements required the buyers to purchase all their requirements of various water softening products exclusively from defendant, and in a prior proceeding instituted by the Federal Trade Commission, a consent decree had been entered specifically prohibiting the *seller* from enforcing them, on the ground that they violated Section 3 of the Clayton Act. Thereafter the defendant seller notified the buyers that, as the contracts were unlawful, they would not be carried out.

16. *Bruce's Juices* v. *American Can Co.*, 330 U. S. 743 (1947).

The Court held that the contracts could be enforced by the purchasers, basing its decision on the alternative grounds that (1) the "requirements" provision could be excised from the contracts in accordance with a severability clause which they contained, and (2) the defendant could not "use this illegal provision as an excuse for avoiding its own contractual obligations" (274 F. 2d at 35). On this second point, the Court stated:

> "In enacting the Clayton Act, Congress had in mind the protection of dealers. The House Report stated the legislation was designed to prevent an unfair trade practice which was '* * * *unfair to the local dealer* and to the community * * *.' (Emphasis supplied.)
>
> "Courts are reluctant to invoke the doctrine of *in pari delicto* where to do so would manifestly work an injustice. Allgair v. Glenmore Distilleries Co., D. C. S. D. N. Y., 91 F. Supp. 93.
>
> "Corbin, in his treatise on contracts (6 Corbin, Contracts, §1540 (1951)) states:
>
> "'If a bargain is illegal, not because a performance promised under it is an illegal performance, but only because the party promising it is forbidden by statute or ordinance to do so, the prohibition is aimed at that party only and he is the only wrong doer. * * * The other party, being himself subject to no prohibition or penalty, may even be one of the class of persons for whose protection the prohibitory statute was enacted.
>
> "'In these cases the refusal of all remedy against a party to the illegal bargain would penalize the very persons for whose benefit the making of such a bargain is prohibited or declared illegal. In such cases, in order to attain the purposes of the law, the courts have frequently enforced the bargain by one or more of the usual remedies, in favor of a party for whose benefit the law was intended and

against a party toward whom the prohibition or penalty was directed. • • • There is no reason why, in a case otherwise proper, a decree for specific performance should not be granted.'

"We hold the case at bar is not one in which the defense of *in pari delicto* may be used to deny relief to the plaintiffs." (274 F. 2d at 35).

We respectfully submit that this Court should resolve the conflict between the instant case and the *Culligan* decision, and should pass upon an important antitrust question which it has never before considered, namely, whether a *seller* can escape its contractual obligations by contending that a contract which the purchaser desires to enforce violates Section 3 of the Clayton Act.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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May 12, 1960

APPENDIX A

No. 13,775

United States Court of Appeals

FOR THE SIXTH CIRCUIT

TAMPA ELECTRIC COMPANY,
Appellant,

v.

NASHVILLE COAL COMPANY,
NASHVILLE COAL, INC., and
WEST KENTUCKY COAL COMPANY,
Appellees.

APPEAL from the United States District Court for the Middle District of Tennessee, Nashville Division.

Decided April 4, 1960.

Before: MILLER, CECIL and WEICK,* Circuit Judges.

MILLER, Circuit Judge. The appellant, Tampa Electric Company, brought this declaratory judgment action in the District Court, pursuant to Sec. 2201, Title 28, United States Code, for the purpose of having its contract of May 23, 1955, providing for the purchase of coal by it from the appellees, declared valid and enforceable. The appellees contended that the contract was illegal and unenforceable by or against either of the contracting parties, in that it was contrary to Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act, *Sections 1, 2 and 14, Title 15, United States Code*. The facts not being in dispute, both the appellant and the appellees moved for summary judgment. The District Judge held that the contract was in

* On the day of the oral argument of the case in this Court, Judge Weick was a District Judge sitting by designation. He was sworn in as Circuit Judge on the following day.

violation of Section 3 of the Clayton Act, was therefore illegal and unenforceable, and that the appellant was entitled to no relief against any of the appellees on account of their refusal to perform under the contract. *Tampa Electric Co.* v. *Nashville Coal Co.*, 168 F. Supp. 456, M. D. Tenn. This appeal followed.

Appellant is an electric public utility serving the city of Tampa, Florida, and neighboring communities. The appellees are engaged in mining and selling coal.

In 1954 appellant operated two integrated generating plants, both located on Tampa Bay, Florida, at which there were eleven generating units, all of which burned oil. In that year, in order to meet the increasing demand for electric energy in its service area, appellant decided to expand its facilities and build a new and additional integrated generating station on Tampa Bay, to be known as the Francis J. Gannon Station, at which it was planned to ultimately install six generating units.

The May 23, 1955, contract was for the purchase of coal for use at the Gannon Station. It was entered into between the appellant as the buyer and the Potter Towing Company, a Tennessee partnership of David K. Wilson and Justin Potter, as the seller. Subsequent to the making of the contract, the interest of Wilson and Potter was transferred to the appellee Nashville Coal Co. and thereafter to the appellee Nashville Coal, Inc., which is a wholly owned subsidiary of the appellee West Kentucky Coal Company. The West Kentucky Coal Company guaranteed the appellant in writing against any loss or damage arising out of nonperformance of the contract.

The contract, after stating that the seller proposed to make available for sale to the buyer large quantities of coal from the West Kentucky field near Uniontown, Ken-

tucky, and that the buyer desired to purchase certain coal for its use in its plant to be constructed near Tampa, upon the terms and conditions thereinafter set out, provided as follows:

> "Seller agrees to provide and deliver on the dock or docks of the Buyer at Plant Gannon coal to supply the total requirements of fuel of the Buyer for the operation of its first two units to be installed at the Gannon Station and the Buyer agrees to accept and pay for such fuel as provided in Article 4 hereof, which fuel requirements shall be not less than 225,000 tons of coal per unit per year. It is further agreed that if during the first 10 years of the term of this contract the Buyer constructs additional units in which coal is used as the fuel, it shall give the Seller notice thereof two years prior to the completion of such unit or units and upon completion of same the fuel requirements thereof shall be added to this contract and be furnished by the Seller and accepted by the Buyer. It is understood that the Buyer has the option to be exercised two years prior to completion of said unit or units of determining whether coal or some other fuel shall be used in same. It is anticipated that deliveries will start approximately March, 1957 for the requirements of the first unit and that deliveries for the requirements of Unit #2 will begin when constructed."

It also provided,

> "The term of this agreement shall be for a period of twenty years from the first day of the month in which month first deliveries are made to the Buyer."

The first unit of the Gannon plant commenced operation August 1, 1957; the second unit on October 29, 1958. The

third unit, a coal burning unit, was under construction at the time this action was filed.

For the appellant to equip the Gannon Station to burn coal necessitated a capital expenditure of $3,000,000.00 more than if the fuel initially chosen had been oil. To supply the appellant under this contract required a capital expenditure in excess of $7,500,000.00 by the appellees.

In April, 1957, just before the first coal was to be delivered under the contract, the appellees advised appellant that they would not perform under the contract, which they contended was illegal and unenforceable by either party. As a result, it has been necessary for appellant to purchase its coal requirements in the market at a price substantially higher than that provided for in the contract.

In making such arrangements it estimated that its coal requirements for its Gannon Station were approximately as follows:

Year 1958	350,000 tons
Year 1959	700,000 tons
Year 1960	700,000 tons
Year 1961	1,000,000 tons

"To increase as required to about 2,250,000 tons per year."

At the time the contract was entered into, coal accounted for less than 6% of the fuel consumed in the entire state of Florida. Every electric generating installation in peninsular Florida burned oil at that time. It was estimated by the buyer that within a very few years the Gannon Station would consume more coal than was presently consumed in the entire state of Florida. Peninsular Florida's coal consumption was approximately 700,000 tons per year.

Appendix A

Section 3 of the Clayton Act provides as follows:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to * * * contract for sale of goods, * * *, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States * * *, on the condition, agreement, or understanding that the * * * purchaser thereof shall not use or deal in the goods, * * *, supplies, or other commodities of a competitor or competitors of the * * * seller, where the effect of such * * * contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

Appellant's initial contention is that the statutory history of Section 3 shows that the Act was not intended to apply to consumers; that it was intended solely for the purpose of protecting dealers and retailers from certain specific practices whereby powerful sellers, through some form of economic leverage, frequently required them to execute agreements not to deal in a competitor's goods as a condition to the purchase of the seller's goods; and that Congress never contemplated that the Act should prevent a consumer from contracting for the purchase of his requirements of a single commodity, even though the amount was very substantial. In other words, Congress was concerned only with attempts by sellers, who were economically powerful, to restrain competition in the distributive process. The statutory language is not so restrictive. It expressly refers to *"a"* contract for sale "for *use,* consumption or resale." (Emphasis added.) The wording clearly includes a single sales contract for *use or consumption,* as well as multiple sales by sellers to numerous dealers or retailers for resale. There is nothing ambig-

uous about this language of the statute. Under such circumstances, we do not look to the legislative history of the Act in order to give it a different construction. In *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346, the Court had under consideration the construction of Section 3 of the Clayton Act. The Court said, "Much is said in the briefs concerning the Reports of Committees concerned with the enactment of this legislation, but the words of the act are plain and their meaning is apparent without the necessity of resorting to the extraneous statements and often unsatisfactory aid of such reports." To the same effect is *Anchor Serum Co.* v. *Federal Trade Commission*, 217 F. (2) 867, 870, C. A. 7th; *George Van Camp & Sons* v. *American Can Co.*, 278 U. S. 245, 253-254. See also: *Ohio Power Co.* v. *N. L. R. B.*, 176 F. (2) 385, 387, C. A. 6th, cert. denied, 338 U. S. 899; *Mid-Continental Petroleum Corp.* v. *N. L. R. B.*, 204 F. (2) 613, 623, C. A. 6th, cert. denied, 346 U. S. 856.

The statute condemns certain transactions, the effect of which may be to substantially lessen competition or tend to create a monopoly in any line of commerce. A single contract of sale of sufficient magnitude, with performance extending over an extended period of time, can cause this result. If it does have this result and is otherwise included within the plain wording of the statute, the statute must be construed in accordance with the Congressional purpose. *Securities & Exchange Commission* v. *C. M. Joiner Leasing Corp.*, 320 U. S. 344, 350-351; *Cornett-Lewis Coal Co.* v. *Commissioner*, 141 F. (2) 1000, 1004, C. A. 6th. In *Standard Oil Co. of California* v. *United States*, 337 U. S. 293, 302-305, the Supreme Court held Section 3 of the Act applicable to a situation where the seller did not occupy a dominant economic position in the industry.

Appendix A

Appellant contends that the contract of sale was not entered into "on the condition, agreement, or understanding" that the appellant would not use or deal in the goods of a competitor, which is necessary in order for the statute to be applicable. Concededly, the contract is a "requirements" contract and does not expressly contain the "condition" required by the statute. But, the contract provides for the appellees to supply the appellant its "total requirements" for the first two coal burning units and for such other units at the Gannon Station as would be constructed as coal burning units. The actual result of this contract is to prevent the purchaser from buying any coal for those units from a competitor of the appellees. We agree with the ruling of the District Judge that the contract is one within the sense and meaning of Section 3 of the Clayton Act, in that it requires the buyer not to use or deal in the goods of a competitor of the seller, irrespective of the absence of the specific words contained in the statute. In *Standard Oil Co. of California* v. *United States, supra*, 337 U. S. 293, and *Anchor Serum Co.* v. *Federal Trade Commission, supra*, 217 F. (2) 867, C. A. 7th, the contracts therein declared illegal were "requirements" contracts, which did not contain the unlawful condition in *haec verba*.

The foregoing ruling does not mean that "requirements" contracts are illegal *per se*. As pointed out in *Standard Oil Co. of California* v. *United States, supra*, 337 U. S. 293, 306-307, "'requirements' contracts may well be of economic advantage to buyers as well as to sellers. The effect of the particular contract under the circumstances of the case is the determining factor. A "requirements" contract of some companies over a short period of time might well avoid the effect proscribed by

the statute, while such a contract of large proportions and extending over a long period of years would clearly fall within the provisions of the statute. *United States* v. *Linde Air Products Co.*, 83 F. Supp. 978, 982, N. D. Ill.; *United States* v. *American Can Co.*, 87 F. Supp. 18, 31-32, N. D. Cal.

There is also an important difference between a "requirements" contract and a contract which calls for the purchase of a definite quantity over a period of time which the buyer estimates to be sufficient to meet his requirements. As pointed out in *United States* v. *Standard Oil Co.*, 78 F. Supp. 850, 867, S. D. Cal., when a dealer agrees to take a specific amount of a product, there is a likelihood that he may, by reason of unexpected shortages or increased demands, use competitive products, and competitors thus will have the opportunity of putting their products into competitive use by the buyer, with the ultimate result of inducing the buyer to handle their products. Under a "requirements" contract for a long period of time this chance is, for all practical purposes, cut off. As stated by the Supreme Court in *Standard Oil Co. of California* v. *United States, supra,* 337 U. S. 293, 314, "It cannot be gainsaid that observance by a dealer of his requirements contract with Standard does effectively foreclose whatever opportunity there might be for competing suppliers to attract his patronage, • • •."

Appellant makes the further contention that Section 3 is not applicable because the contract does not prohibit it from dealing in the goods of a competitor, as required by the Act. It is argued that coal and oil are competitive fuels, that the contract deals only with the purchase of coal, and that the appellant, as is permitted by the contract, buys oil from various suppliers for its non-coal

burning units. It is also pointed out that there is the possibility that existing oil burning units could be converted to coal or that additional coal burning units, not covered by the contract, could be constructed, the coal for which could be purchased from any of appellees' competitors. The argument is a plausible one, but we believe it completely ignores the realities of the situation.

It is true that coal and oil are competitive fuels. *West Ohio Gas Co.* v. *Public Utilities Commission*, 294 U. S. 63, 72. But, for the purposes of Section 3 of the Clayton Act, we believe that each is to be treated as a separate, defined subdivision of the fuel industry generally. *George Van Camp & Sons* v. *American Can Co.*, *supra*, 278 U. S. 245, 253; *United States* v. *E. I. duPont de Nemours & Co.*, 353 U. S. 593-594; *Oxford Varnish Corp.* v. *Ault & Wiborg Corp.*, 83 F. (2) 764, 766, C. A. 6th. The present contract deals with coal and coal burning units only, and we treat as irrelevant appellant's purchases of oil for its oil burning units in an entirely separate plant at a different location.

At the time the contract was made, there were no coal burning units not covered by the contract. There is nothing to indicate that there is any planned or probable conversion of oil burning units into coal burning units or construction of coal burning units not covered by the contract. The contract requires the appellant to purchase all of its present, and its planned future, requirements of coal from a single seller. We agree with the ruling of the District Judge that the question must be decided upon the basis of realities and the contract construed reasonably in the light of existing facts. The remote possibility that a buyer might use a competitor's product is an immaterial factor in the actual picture before the Court. *Interna-*

tional Salt Co. v. *United States*, 6 F. R. D. 302, 307, S. D. N. Y., 332 U. S. 392; *Northern Pacific Railway Co.* v. *United States*, 356 U. S. 1, 10, footnote 8; *Judson L. Thomson Mfg. Co.* v. *Federal Trade Commission*, 150 F. (2) 952, C. A. 1st, cert. denied, 326 U. S, 776; *Signode Steel Strapping Co.* v. *Federal Trade Commission*, 132 F. (2) 48, C. A. 4th.

As appellant contends, it is not sufficient that the "requirements" contract is one which in substance prohibits the purchaser from dealing in the goods of a competitor of the seller. Under Section 3 such a contract is not invalid unless its effect "may be to substantially lessen competition or tend to create a monopoly in any line of commerce." In *International Salt Co.* v. *United States, supra*, 332 U. S. 392, 396, the Court ruled that where the volume of business affected by the contract cannot be said to be insignificant or insubstantial the tendency of the arrangement to accomplishment of monopoly seems obvious, pointing out that it is immaterial that the tendency is a creeping one rather than one that proceeds at full gallop. In *Standard Oil Co. of California* v. *United States, supra*, 337 U. S. 293, 314, the Court held that the qualifying clause of Section 3 is satisfied by proof that competition has been foreclosed in a substantial share of the line of commerce affected and that it was the purpose of Section 3 to remove a potential clog on competition wherever, were it to become actual, it would impede a substantial amount of competitive activity. Applying this standard to the present case there is no question but that the effect of the contract will be to substantially lessen competition. At the estimated 1959 rate of consumption, namely 700,000 tons per year, it would about equal peninsular Florida's annual coal consumption prior to the execution of the contract.

Appendix A

Using the estimated 1,000,000 tons for 1961 as the average annual purchases during the twenty year life of the contract, the total dollar pre-emption over the life of the contract at the minimum price of $6.50 per ton would amount to $128,000,000.00. This is, of course, not insignificant or insubstantial.

Nor is the case removed from the operation of the Act by the fact that the contract would have overall beneficial results in starting the substantial use of coal in peninsular Florida and thus afford substantial competition to the use of oil. The possible benefits that may result from one particular contract, by reason of the special circumstances applicable to it, cannot override the general policy of the Act prohibiting transactions which tend to create a monopoly in any line of commerce. *Pennsylvania Water & Power Co.* v. *Consolidated Gas, Electric Light & Power Co.*, 184 F. (2) 552, 559, C. A. 4th, cert. denied, 340 U. S. 906; *Standard Oil Co. of California* v. *United States*, *supra*, 337 U. S. 293, 311-312.

Although the contract is in violation of the statute and therefore illegal, appellant contends that the appellees should not be allowed to take advantage of their own illegal act to relieve themselves of a contract obligation which now appears burdensome. Appellant recognizes the well settled general rule that a court will not lend its assistance in any way towards carrying out the terms of an illegal contract. *McMullen* v. *Hoffman*, 174 U. S. 639, 654; *E. E. Taenzer & Co.* v. *Chicago, R. I. & P. Ry. Co.*, 191 F. 543, 550, C. A. 6th; *National Transformer Corp.* v. *France Mfg. Co.*, 215 F. (2) 343, 361, C. A. 6th. But, it urges upon us a well recognized exception to this general rule that if the parties are not in *pari delicto* and the undertakings of each are not equally blameworthy, a court of

equity may, in furtherance of justice and of a sound public policy, aid the one who is comparatively the more innocent. *Marshall* v. *Lovell*, 19 F. (2) 751, 753-754, C. A. 8th, quoting from *Pomeroy's Equity Jurisprudence*, *4 Ed. Section 942; Restatement, Contracts, Section 601; 6 Corbin, Contracts, Section 1540 (1951); Ring* v. *Spina*, 148 F. (2) 647, 653; C. A. 2nd; *Allgair* v. *Glenmore Distilleries Co.*, 91 F. Supp. 93, 95-96, S. D. N. Y.; *Hartford-Empire Co.* v. *Glenshaw Glass Co.*, 42 F. Supp. 711, 717, W. D. Pa. Appellant points out that Section 3 of the Clayton Act is directed against the seller; its purpose is to protect the buyer; and that the case falls within the exception.

We think that our decision on this issue is controlled by the recent analysis of the problem by the Supreme Court in *Kelly* v. *Kosuga*, 358 U. S. 516. In that case the Court rejected the defense of illegality in an action under a contract which violated the Sherman Anti-Trust Act, but pointed out that in a restricted class of cases the defense was a valid one. If the contract is of such a nature that a part of it constitutes an intelligible economic transaction in itself and the enforcement of that portion of the contract would not be to enforce a violation of the Act, then such portion of the contract will be enforced in order to avoid an inequitable result. But, the Court will not enforce a contract which is illegal under the anti-trust laws of the United States if, in doing so, the Court would be a party to carrying out of one of the very restraints forbidden by the Act. *Kelly* v. *Kosuga*, *supra*, at page 520; *Continental Wall Paper Co.* v. *Louis Voigt & Sons Co.*, 212 U. S. 227, 261-263. It is immaterial whether the contract was for the benefit of the seller or the buyer. The determining factor is whether the result of the contract had the proscribed effect and this is so, even though

the result is a harsh one for one of the parties. *Anchor Serum Co.* v. *Federal Trade Commission*, *supra*, 217 F. (2) 867, 870, 873, C. A. 7th. The aid of the Court is denied not for the benefit of either of the parties, but because public policy demands that it should be denied without regard to the interests of individual parties. *Continental Wall Paper Co.* v. *Louis Voigt & Sons Co.*, *supra*, 212 U. S. 227, 262.

The contract in the present case is an executory one. It is not at the present time divisible into an executed portion and an executory portion so as to permit recovery for any portion which may have been performed without ordering a violation of the Act in the future. The appellant is seeking to have declared valid the very provisions which make it invalid. To do so would be to compel the parties to engage in business with each other over a period of twenty years in a manner which the Act declares invalid. The recent decision of the Court of Appeals for the Seventh Circuit in *Beloit Culligan Soft Water Service, Inc.* v. *Culligan, Inc.*, 274 F. (2) 29, December 15, 1959, rehearing denied January 12, 1960, is, we believe, distinguishable for the same reasons. Under such circumstances, the Court will not assist either party in its enforcement.

This view of the case makes it unnecessary to consider the effect of Sections 1 and 2 of the Sherman Act.

The judgment is affirmed.

WEICK, Circuit Judge, dissenting. It is with reluctance that I have filed this dissenting opinion, particularly in view of the careful consideration which this case has received by the majority and by the District Judge. With deference to my colleagues, whose views I respect, I am of the opinion that the authorities on which they relied,

when applied to the facts of this case, do not compel the decision which they reached. I think the judgment below has produced a harsh result, not in the contemplation of the Clayton Act, which is being enforced against the wrong party.

The seller[1] has successfully avoided its contractual obligations with the defense that in making the contract of sale it violated the anti-trust laws, § 3 of the Clayton Act (Title 15 U. S. C. § 14). While this defense has been frequently resorted to by buyers in attempting to avoid payment of their indebtedness to sellers, it is, I submit, somewhat unusual for a seller to plead its own violation of the anti-trust laws in asking a court to relieve it of its contractual obligations, particularly since these laws were aimed at sellers and not buyers.

The type of defense availed of here by the seller has not met with favor by the Supreme Court when invoked by a buyer. *Kelly* v. *Kosuga*, 358 U. S. 516, 518 (1959); *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U. S. 743 (1947); *Wilder Mfg. Co.* v. *Corn Products Refining Co.*, 236 U. S. 165 (1915); 42 *University of Virginia Law Review* 785.

In enacting the anti-trust laws Congress created a right and prescribed the remedy. The remedy of private parties injured by reason of violation of the anti-trust laws is an action for treble damages[2] and injunction.[3] There are also enforcement provisions for injunctive relief in actions by the Federal Trade Commission[4] and the United States.[5]

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[1] For the purposes of this opinion appellant will be referred to as Tampa or buyer and appellee as seller.

[2] Title 15 U. S. C. § 15.

[3] Title 15 U. S. C. § 26.

[4] Title 15 U. S. C. § 21.

[5] Title 15 U. S. C. § 25.

Appendix A

The remedy provided private parties would seem to be adequate, namely, the recovery of treble damages and an injunction to stop the illegal practices. In any event, the statutory remedy is all that Congress provided. Congress could have vitiated contracts made in violation of the Clayton Act. It did not do so.

The provisions of the Clayton Act are materially different from Section 1 of the Sherman Act. The Sherman Act is directed to "every contract • • • in restraint of trade or commerce • • • is declared to be illegal." 15 U. S. C. 1. The Clayton Act is directed against the person. It provides: "• • • It shall be unlawful for any person • • • to contract for sale of goods • • •." Criminal sanctions are imposed for violation of the Sherman Act, but not for violation of the Clayton Act.[6]

Appellee successfully argued in the District Court that the legislative history of the Clayton Act should be ignored, on the authority of *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346, 356 (1922).

While it may have been crystal clear in *Standard Fashion* that the contract there involved was a violation of the Clayton Act, I feel that it is not so apparent when applied to the contract here. The legislative history is important because it aids in the interpretation of the statute and reveals that Congress never intended the law to be applied to such a case as the one at bar.

In *Harrison* v. *Northern Trust Co.*, 317 U. S. 476, 479 (1943), the Court said:

> But words are inexact tools at best, and for that reason there is wisely no rule of law forbidding

[6] The bill as it passed the House of Representatives contained criminal sanctions. These were eliminated in the Senate.

> resort to explanatory legislative history no matter how "clear the words may appear on superficial examination."

Mr. Justice Holmes, in *Towne* v. *Eisner*, 245 U. S. 418, 425 (1918), said:

> A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances in which it is used.

It has been well stated:

> The records of legislative assemblies once opened and read with a knowledge of legislative procedure often reveal the richest kind of evidence * * *. Legislative history similarly affords in many instances accurate and compelling guides to legislative meaning * * *. To ignore legislative processes and legislative history in the processes of interpretation, is to turn one's back on whatever history may reveal as to the direction of the political and economic forces of our time. Landis, *A Note on Statutory Interpretation*. 43 *Harvard L. Review* 886, 888, 889, 892.

The evils sought to be remedied by the Clayton Act were set out in the reports of the Congressional committees, in the hearings before the committees and in the debates.[7]

The evils were declared to be exclusive or tying contracts made between manufacturer and dealer whereby the latter specifically agreed not to deal in the commodities of the seller's competitors and contracts tying non-patented articles to the sale of patented articles.

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[7] H. R. Rep. No. 627, 63rd Cong. 2nd Session (May 6, 1914); S. Report No. 698, 63rd Cong. 2nd Session (July 22, 1914); 51 Cong. Rec. 9406, 9407, 9160, 14226, 14270.

Appendix A

The legislative proceedings are all too clear that what Congress was aiming at was monopolistic practices of powerful sellers in the distribution of goods whereby the dealer or buyer was prohibited from dealing in the goods of the seller's competitors. The legislation was directed against sellers, not buyers, and was intended to curtail the monopolistic practices of the commercial and industrial giants of the day.

At the same time, the need was recognized for more effective legal relief to private parties injured by violation of the anti-trust laws. Private parties threatened by loss or damage from violation of the law were given the right to injunctive relief, and treble damage actions were facilitated by making judgment in a Government suit or prosecution prima facie evidence of the violation there established. Despite these efforts to aid private parties, no action was taken to incorporate the provisions of pending bills which would have authorized broad application of the defense that the plaintiff in a civil action had violated the anti-trust laws. Lockhart, *Violation of the Anti-trust Laws as a Defense in Civil Actions*, 31 Minn. L. R. 507, 551.

Annexation of the illegality defense to the statute by implication either as an inference of unexpressed intention of Congress or as the result of some doctrine of common law, would be justified only if it would be at least a rational, nondiscriminatory and appropriate means of making the policy of the statute effective. Cf. *Bruce's Juices v. American Can Co.*, 330 U. S. 743, 752 (1947).

The buyer was a privately owned public utility engaged in the production and sale of electricity. It served the City of Tampa and surrounding communities. It operated under franchise from the State of Florida and was regulated by public authority. Its rates were fixed by the

Public Utility Commission of Florida. It was a monopoly operating under legal sanction.

While this did not give Tampa license to violate the anti-trust laws, *Pennsylvania Water & Power Co.* v. *Consolidated Gas, Electric Light & Power Co.*, 184 F. 2d 552 (C. A. 4, 1950), cert. denied 340 U. S. 906 (1950), nevertheless, its needs and requirements as a regulated public utility, which were materially different from those of private industry, are factors that must be considered in determining the propriety of the contract in the present case. As was stated by the Court of Appeals for the District of Columbia in *Pennsylvania Water & Power Company* v. *Federal Trade Commission*, 193 F. 2d 230, 234 (C. A. D. C., 1951), aff'd 343 U. S. 414 (1952), "the anti-trust laws can have only limited application to industries regulated by specific statutes." The Court observed that laws aimed at combatting monopolistic practices must be applied somewhat differently to those industries which are of themselves monopolies because of public grant, the exigencies of nature, or legislative preference for a particular way of doing business.

The buyer was under obligation to the public to furnish a continuous supply of electricity at rates fixed by the public utilities commission. To meet these obligations it was not only desirable, but absolutely necessary that it be supplied with the boiler fuel to make the electricity. Its rates could not be fixed for any appreciable length of time if it were required to depend upon a fluctuating market price for boiler fuel. It would certainly not be in the public interest to require a utility to purchase boiler fuel on short term contracts or on the open market so that every time there was a shift in the market price, the utility's rates to the public would have to be adjusted.

Appendix A

It is fairly inferable from the record that a rise in the market price of coal took place subsequent to the date of the contract and prior to the time for commencement of deliveries thereunder because, after the seller's repudiation, the buyer had to pay a substantially higher price than the contract price for its requirements of coal. The contract, however, contained an "escalator clause" to take effect upon the commencement of the contract in 1957 providing for adjustments based on the average weekly gross earnings of production workers in manufacturing industry.

The fact that the buyer was required to pay a substantially higher price for coal after the seller's repudiation demonstrates the wisdom of having an enforceable contract. Having such a contract would not only fix the price of coal, but also ensure the continuity of supply. In order to take care of the requirements of its customers, which undoubtedly involved seasonal low and peak loads, a requirements contract seemed best adapted for Tampa's needs. The contract contained a provision for adjustment of any gross inequity that could result from the economic conditions not contemplated by the parties, which was to be corrected by agreement or arbitration.

In the case of *Twin City Pipe Line Co.* v. *Harding Glass Co.*, 283 U. S. 353 (1931), the contract in suit called for the largest consumer of gas in Fort Smith, Arkansas to take all its requirements from one company, which amounted to a million to a million and a half cubic feet per day. The pipe line company sued for specific performance of the contract. The contract in question had no time limit, but the consumer did have the option to purchase other gas if the gas company could not deliver an adequate supply. Although the defense interposed was

that the contract was contrary to the public policy and laws of Arkansas, the considerations involved were that the contract was illegal because "it [was] in restraint of trade, tends to the monopolization at Ft. Smith of the sale of gas by the pipe line company, and is an undue restraint of business competition between companies supplying gas". 39 F. 2d 408, 409. The Court of Appeals held the contract to be illegal. 39 F. 2d (C. A. 8). The Supreme Court reversed, and entered judgment for the plaintiff. In so doing the Court stated:

> • • • The contract does not subject the glass company to, or tend in any manner to impose upon the public, any wrong, disadvantage or evil attributable to monopoly or restraint of trade.
>
> The glass company has failed to show that the contract has any tendency to injure the public, and no reason appears why it should not be enforced according to its terms. 283 U. S. 333, 358.

In the case of *In the Matter of Houston Texas Gas & Oil Corp.*, 16 F. P. C. 118 (1956), the Federal Power Commission approved a 20 year requirements contract under which gas would be brought into Florida to compete with oil. Its approval was conditioned on elimination of cancellation provisions. The Court of Appeals affirmed in *Florida Economic Advisory Council* v. *Federal Power Commission*, 251 F. 2d 643 (C. A. D. C., 1957), cert. denied 356 U. S. 959 (1958), stating: "• • • The injury to petitioner [the oil concerns] is that it must share what has heretofore amounted to a power monopoly," id., 649. Cf. *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U. S. 332 (1956).

The long term of this contract (20 years) and the fact that over the years it involved a large amou of coal were

factors taken into account by the majority in holding it illegal. The business of the buyer required it to use large quantities of boiler fuel. Yet as compared with oil, only two units were using coal whereas eleven units were burning oil.

Prior to the seller's repudiation of the contract, Tampa, in reliance on the contract, had made a capital expenditure of $3,000,000 more than would have been required for oil burning equipment. The seller had also expended $7,500,000 in order to place itself in position to perform the contract. It is, of course, unfortunate for both parties that the seller did not discover that it had violated the law until after these large capital expenditures had been made. Assuming that each entered into the contract with the profit motive in mind, I do not think that 20 years was an unreasonable length of time in which to amortize, out of profits, these large capital expenditures.

It is my firm conviction that, read in the light of its legislative history, the Clayton Act was never intended to vitiate a requirements contract made by a single public utility to ensure a continuing supply of boiler fuels at a constant price. Such a contract is not only an economic necessity in circumstances such as these, but also serves the best interest of the public, who in the long run must shoulder the burden of increased costs of the utility. The holding in the *Twin City* case, *supra*, and the insistence upon such a contract by an agency of the United States in the *Houston Texas Gas & Oil* proceedings, *supra*, only serves to substantiate that opinion.

Even if the view is taken that the Clayton Act is applicable to the contract in suit, I feel that no violation thereof has been established.

In order for the contract of sale to violate the Clayton Act two elements must be proven. First, that the contract

was "*on the condition, agreement or understanding* that the • • • purchaser • • • shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor • • • of • • • seller." Second, the effect must be to substantially lessen competition or create a monopoly in any line of commerce[8] (Emphasis added.)

No such condition was embodied in the written contract either expressly or by fair implication. All that the contract provided was for the supply of the buyer's total requirements *for the first two coal burning units to* be installed at the Gannon Station and for any others built there *during the first ten years* of the contract. Eleven existing units were burning oil. The buyer was free to convert all of its oil burning units to coal burning units and purchase its coal therefor from anyone it chose. Such possible conversion is not as remote as was claimed. In an affidavit of Tampa's president, it is stated that conversion of other units is presently being considered. The buyer was also free to erect new coal burning units at any place other than at Gannon Station, and after ten years at the Gannon Station, and buy its coal from anyone. The buyer also had the option at the Gannon Station to reduce the quantity of coal by 15% if it desired to use the by-product of a local supplier.

Since the contract contained no such condition, agreement or understanding as the Clayton Act proscribes, the Act had no application to the present case. But the seller claims that any "requirements" contract comes within the purview of the Clayton Act. I do not agree. A requirements contract could not come within the scope of the Act unless in effect it prohibited the buyer from dealing in the

[8] Title 15 U. S. C. § 14.

goods of any one else and operated substantially to lessen competition or create a monopoly. If the contract was to purchase only part of the buyer's requirements and he is free to purchase the remainder elsewhere, no violation of the statute occurs.

Looking at the actualities of the case, the buyer was not a dealer in coal or oil. It consumed both in making electricity which it sold to the public. In the very real sense, coal and oil were competitive fuels and the buyer was using both. Eleven of its units were oil burning and only two were to be coal burning. Prior to the construction of the coal burning units at its Gannon Station the buyer used only oil. In fact, on account of the contract in question coal for the first time broke into the Florida utility market which theretofore had been heavily blanketed by large oil companies.

The fact that the contract provided for the buyer's requirements at the two units of the Gannon Station did not bring the contract within the scope of the Clayton Act because it did not foreclose the buyer from using coal in other plants or dealing with the seller's competitors elsewhere.

It must be remembered that at the time of the contract the Gannon Station had not been erected. The contract provided for something to be done in the future. It did not limit Tampa in converting or constructing other coal units anywhere or purchasing coal from anyone except for use at the Gannon Station. The buyer had no interest in creating a monopoly of coal in the seller.

But even if the contract could be construed as requiring the buyer to take all its requirements of coal from seller, under the facts and circumstances of this case, there was no violation of the law.

Of importance in this regard is the holding that, in the circumstances of this case, coal constitutes a "line of commerce." The coal was purchased by Tampa as a source of power for its generators, not for resale to ultimate consumers. It was to be used as a boiler fuel.

The record shows that the Atomic Energy Commission has approved the application of Tampa to build an atomic reactor. It is planned that electricity generated from fissionable fuel will be on its lines by 1964. In order to induce Tampa not to convert its other boilers from oil to coal the oil companies have offered to reduce the price of oil.

It is my conviction that the line of commerce in which these parties were dealing was boiler fuels, not just coal. If the line of commerce is boiler fuel generally, then this contract could not come within the purview of Section 3 of the Clayton Act, as Tampa was certainly free to purchase boiler fuels, other than coal, from whoever it chose.

The standard to be applied in determining what constitutes a line of commerce is derived from three recent Supreme Court decisions, *International Boxing Club* v. *United States*, 358 U. S. 242 (1959); *United States* v. *E. I. duPont de Nemours & Co.*, 353 U. S. 586 (1957), and *United States* v. *E. I. duPont de Nemours & Co.*, 351 U. S. 377 (1956).

In the *International Boxing Club* case the question presented was whether championship boxing contests were distinct from all professional boxing events. The Supreme Court held they were.

In the 1957 *duPont* case the question presented was whether automotive fabrics and finishes were distinct from all other fabrics and finishes. The Supreme Court held they were.

Appendix A

In the 1956 *duPont* case the question presented was whether cellophane was distinct from all other flexible packaging materials. The Supreme Court held it was not. In each of those cases the test applied was constant, while the results differed. The test was enunciated in the *duPont* cellophane decision (351 U. S. 377):

> Determination of the competitive market for commodities depends on how different from one another are the offered commodities in character or use, how far buyers will go to substitute one commodity for another. (at p. 393)
>
> What is called for is an appraisal of the "cross-elasticity" of demand in the trade. See Note, 54 Col. L. Rev. 580.
>
> The varying circumstances of each case determine the result. In considering what is the relevant market for determining the control of price and competition, no more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purposes make up that "part of the trade or commerce", monopolization of which may be illegal. (at pp. 394-5)
>
> An element for consideration as to cross-elasticity of demand between products is the responsiveness of the sales of one product to price changes of the other. (at p. 400)
>
> The "market" which one must study to determine when a producer has monopoly power will vary with the part of commerce under consideration. The tests are constant. The market is composed of products that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered. (at p. 404)

With the basic criteria in mind, the three decisions are easily reconciled. As was developed in extensive findings of fact in the *du Pont* cellophane case, a variety of prod-

ucts are wrapped in both cellophane and several other flexible packaging materials. More simply, a loaf of bread can be wrapped with equal facility in cellophane, wax paper, etc. They are interchangeable. On the other hand, a car cannot be painted with house paint and vice versa. Hence, the result in the 1957 *du Pont* litigation. As to the *International Boxing Club* decision, the Court found that, in public appeal, championship fights exert a different drawing power than do other boxing matches. The decaying status of professional boxing in the United States attests to that fact, as it is only the occasional "glamour" fight which is able to create even a ripple of public enthusiasm.

It is interesting to note though, that in each of the decisions the line of commerce was of such scope as to include sub-divisions within it. The general classification of championship fights covers bouts in each weight class; automotive finishes and fabrics have many variations; the diversity of flexible packaging materials considered is clearly seen in the Court's opinion in the *du Pont* cellophane case.

An excellent analysis of the proper application of the "line of commerce" test is found in *United States* v. *Guerlain, Inc.*, 155 F. Supp. 77 (D. C. S. D. N. Y., 1957) probable jurs. noted 355 U. S. 937, 951, judgments vacated for consideration of United States' motion to dismiss 358 U. S. 915 (1958). In that action it was alleged that certain French manufacturers and American distributors of perfumes had registered the trade-marks of various perfumes in the name of the American distributors in order to monopolize the American market for those brands. The Court heard evidence that many perfume manufacturers were able to virtually duplicate the fragrances of their

competitors and that the average person would not distinguish between the two scents. On the other hand, it was shown that in fact the most important element in successful marketing of name brand perfumes is the establishment of a demand for the name, rather than the odor. The Court concluded:

> Objectively, the products may be more than reasonably interchangeable with others. But the lack of objectivity in consumer demand impairs the basis of interchangeability and negates a finding of cross-elasticity.

The Court distinguished that situation, wherein consumer demand is for a name, with the motives of the manufacturers in the *du Pont* cellophane case, who:

> Were guided by careful and objective considerations of utility and price * * *. Thus, small variations in price or quality would induce a manufacturer to shift from one flexible packaging material to another, in accordance with a balance of all the utilities toward the achievement of the most efficient economic operation.

A converse holding, based on the interchangeability test, is found in *American Crystal Sugar Co.* v. *Cuban-American Sugar Co.*, 152 F. Supp. 387 (D. C. S. D. N. Y., 1957) aff'd 259 F. 2d 524 (C. A. 2, 1958). There the court held refined sugar generally to be a line of commerce, whereas it had been contended that cane sugar and beet sugar were separate lines. This finding was upheld in the Court of Appeals, which noted that the two types of sugar are functionally interchangeable, notwithstanding the fac that cane sugar sells at a higher price than beet sugar, and that cane sugar has a greater public acceptance.

Appendix A

A factor emphasized by the Court of Appeals was the sensitivity of the two types of sugar to price changes by one another.

Where does coal, as a boiler fuel, fit into this pattern? The Supreme Court has taken judicial notice of the competitive nature of fuels generally. *West Ohio Gas Co.* v. *Public Utilities Commission*, 294 U. S. 63, 72 (1935). This should be some indication that boiler fuels as a class are a line of commerce.

Application of the interchangeability test convinces me that there exists such a degree of cross-elasticity between coal and other boiler fuels as to constitute boiler fuels the relevant line of commerce in this case. Each of the boiler fuels—coal, oil, gas and atomic energy—is utilized in the same manner to produce the same result. As each is consumed power is produced to drive the generators which in turn produce electric energy. The public demand being satisfied is for electric energy and the boiler fuel being utilized in the production thereof is not a material factor influencing the consumers' market.

What is presented here is the instance of a producer guided by careful and objective considerations of utility and price striving to achieve the most efficient economic operation, as in the *du Pont* case, rather than an instance of a non-objective consumer market, as in the *Guerlain* case. It is clear from this record that Tampa is basically concerned with factors of economic utility in its operation, as it is considering conversion of other oil burning units and expansion into the field of atomic energy as a source of power. Such decisions are motivated by a desire to render the best possible service at the lowest practical rates, while realizing a reasonable profit.

The factor of price sensitivity is also present in this case. Following the initial use of coal by Tampa its oil

suppliers offered to reduce prices in order to meet the challenge of the new fuel.

I find that coal, oil, gas and atomic energy meet the interchangeability test and are components of the general line of boiler fuels. This contract, relating only to coal, cannot establish a monopoly in a "line of commerce" within the meaning of the Clayton Act, and accordingly cannot be violative thereof.

Even if coal is deemed to be the relevant line of commerce that alone does not establish a violation of the Clayton Act by this contract. In order that a requirements contract come within the terms of the Act its effect must be "to substantially lessen competition or tend to create a monopoly in any line of commerce." Requirements contracts are not *per se illegal*. *United States* v. *Columbia Steel Co.*, 334 U. S. 495, 524 (1948); *United States* v. *Bausch & Lomb Optical Co.*, 321 U. S. 707, 728-9 (1944). Cf. *Federal Trade Commission* v. *Curtis Publishing Co.*, 260 U. S. 568 (1923); *Beloit Culligan Soft Water Co.* v. *Culligan, Inc.*, —— F. 2d —— (C. A. 7, 1959). This fact was tacitly admitted in the *Standard Oil* decision, when it was recognized that:

> Requirements contracts, on the other hand, may well be of economic advantage to buyers as well as to sellers and thus indirectly of advantage to the consuming public. 337 U. S. 293, 306.

See dissenting opinion of Justice Frankfurter in *Federal Trade Commission* v. *Motion Picture Advertising Service Co.*, 344 U. S. 392, 402 (1953).

What were the actual monopolistic consequences of this single contract? At the time it was entered into, in the entire State of Florida only 792,000 tons of coal were

being consumed annually. It was conceded that within a short period of time the Gannon Station would be using amounts in excess of that to satisfy its requirements.

Looking only at those two figures the contract would appear, in fact, to have created a situation of monopoly in favor of the seller in Florida. However, it was also conceded that as a result of this contract Tampa became the only substantial consumer of coal in Florida. Further, at the time the contract was entered into coal accounted for less than 6% of the fuel consumed in the entire State of Florida, and every power-generating unit in Peninsular Florida burned oil in its boilers.

Tampa services an area of approximately 1,700 square miles covering only 3% of the total land area of Florida. Within that area resides approximately 11% of Florida's population.

Any monopoly which seller enjoys extends only to that area serviced by Tampa. Competition has not been foreclosed by this contract for the coal business of the utilities serving the remaining 97% of the state embracing the 89% of the population residing therein. I do not consider this evidence to fall within the area of economic inquiry rejected as irrelevant by the Supreme Court in *Standard Oil of California* v. *United States*, 337 U. S. 293 (1949). In that case it was urged that in fact competition had flourished as a result of the contracts under attack. The Court said that in light of the fact that Standard Oil had 8,000 exclusive dealing contracts with 16% of the retail outlets selling 6.7% of all gasoline in a seven state area such evidence could not overcome the natural tendency of the contracts to substantially lessen competition and should not be considered. That situation is so far removed from the one at bar that I cannot consider the

holding to militate against consideration of the market left free for competition after this contract.

It may be contended that this circumstance is too speculative and founded upon a mere possibility that other utilities may convert to the use of coal. In answer to that it need only be observed that prior to this contract Tampa was not a coal consumer, but that it made the change. It is not unreasonable that now, once coal in any significant quantity has been introduced into the Florida market, other utilities may follow suit. They are a presently existing potential market. The choice of conversion is up to them, as it was to Tampa, prodded perhaps by sales promotion on the part of coal companies wishing to acquire their business.

I cannot consider a single contract with a single utility serving only 3% of the land area and 11% of the population of a single state as "substantially lessening competition or tending to create a monopoly." The remainder of the utilities throughout the state are a potential market for free competition. If they choose not to deal in the commodity covered by the contract, for reasons of their own, that should not operate to invalidate the one contract already entered into.

Any contract of sale, to some degree, lessens competition, as it takes the particular buyer out of the competitive market for the commodity contracted for. But the Clayton Act requires more than that—the lessening must be substantial, and substantiality is lacking where 89% of the potential consumers of a product in a state are free to deal among all who sell it. Cf. *Excelsior Motor Mfg. & Supply Co.* v. *Sound Equipment, Inc.*, 73 F. 2d 725 (C. A. 7, 1934), cert. denied 294 U. S. 706 (1935).

Appellee has not cited any authority in which a single contract of such limited application as that under con-

sideration has been held to violate the anti-trust laws. Indeed, in the prior decisions either or both of two elements, each of which is absent herein, existed.

This contract in no way resembles the so-called "tying agreements" where the owner of a patented product attempts to extend his patent monopoly by requiring the buyer to purchase non-patented articles also, *International Salt Co.* v. *United States*, 332 U. S. 392 (1947); *International Business Machines* v. *United States*, 298 U. S. 131 (1936); *Oxford Varnish Corp.* v. *Ault & Wiborg Corp.*, 83 F. 2d 764 (C. A. 6, 1936); *Radio Corp. of America* v. *Lord*, 28 F. 2d 257 (C. A. 3, 1928); *United States* v. *Linde Air Products Co.*, 83 F. Supp. 978 (D. C. N. D., Ill., 1949); or where the seller had such market domination over a non-patented article as to be able to require the purchase of a "tied" product with it. *Northern Pacific Railway Co.* v. *United States*, 356 U. S. 1 (1958); *Judson L. Thomson Mfg. Co.* v. *Federal Trade Commission*, 150 F. 2d 952 (C. A. 1, 1945), cert. denied 326 U. S. 776 (1945); *Signode Steel Strapping Co.* v. *Federal Trade Commission*, 132 F. 2d 48 (C. A. 4, 1942); *United States* v. *American Can Co.*, 87 F. Supp. 18 (D. C. S. D. Cal., 1949).

Those cases not involving tying agreements had the other principal element not found here—an actual monopoly in the relevant market. In *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346 (1922), the seller controlled 40% of the nations 52,000 pattern agencies by exclusive contract. In *Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U. S. 457 (1941), the manufacturers comprising the Guild sold 38% of all women's garments wholesaling at $6.75 and up and more than 60% of those at $10.75 and up. *Dictograph Products Inc.* v. *Federal Trade Commission*, 217 F. 2d 821 (C. A.

2, 1954), cert. denied 349 U. S. 940 (1955), involved exclusive dealing contracts tying up approximately 22% of the nation's 1,000 hearing aid distributors. The seller in *Anchor Serum Co.* v. *Federal Trade Commission*, 217 F. 2d 867 (C. A. 7, 1954), had exclusive dealing contracts with 16 wholesalers including the two largest in Illinois and Iowa, which were the two largest markets for its products. While not indicating the total amounts and percentages of business involved the Court did note that *one* of Anchor's 32 competitors had made over $500,000 in sales to the Illinois and Iowa wholesalers over a three year period, which business it lost as a result of the exclusive dealing contracts of the seller. The Pullman Co., *United States* v. *Pullman Company*, 50 F. Supp. 123 (D. C. E. D. Pa., 1943), was the sole supplier in the United States of railroad sleeping cars and car service, and had maintained that position partially by the use of exclusive dealing contracts.

Only in *Standard Oil of California* v. *United States*, 337 U. S. 293 (1949), and *United States* v. *Richfield Oil Corp.*, 99 F. Supp. 280 (D. C. S. D. Cal., 1951), aff'd 343 U. S. 922 (1952), was the enormity of the seller's position in the market such as to be considered less than dominant. But even those cases present a situation much more aggravated than herein. In the *Standard Oil* case the seller had 8,000 exclusive dealing contracts with 16% of the independent service stations in a seven state area, although their sales constituted only 6.7% of the total gasoline sold. Furthermore, Standard's total sales constituted 23% of all the gasoline sold in the market. It was found in *Richfield* that 7,546 oral and written exclusive dealing contracts had been made by seller covering operations in six states and involving $43,173,000 in sales for the year 1950 alone.

Appendix A

Richfield was affirmed by the Supreme Court on the authority of *Standard Oil*. In this regard, it is important to note the interpretation of the *Standard Oil* decision by Justice Frankfurter, who wrote the opinion:

> In any event, in the Standard Oil case, we recognized the discrepancy in bargaining power [between seller and buyer] and pointed out that retailers might still insist on exclusive contracts if they wanted. *Federal Trade Commission* v. *Motion Picture Advertising Service Co.*, 344 U. S. 392, dissent at 402.

The importance of disparity in bargaining power in anti-trust cases has been recognized by the Supreme Court. *Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 594, 611 (1953).

There was no inequality of bargaining power in this case. The seller was but one of 700 coal producers capable of serving the buyer, and was not shown to be of such size as to be capable of any economic coercion. The buyer has not been shown to have been capable of exerting any unreasonable demands in its own behalf. For all that appears, the contract was freely negotiated, and a fair reading of it gives one the impression that it was equitable to both parties in all material regards.

The seller would have the Court impose extra-judicial sanctions not provided by Congress to relieve it of its contractual obligations. If this is permitted without the utmost caution, the door may open wide to inconsequential allegations of anti-trust violations in every action on a contract of any substantial magnitude. While this might be good for anti-trust lawyers, it is doubtful whether it would be of much benefit to anyone else. It would cer-

tainly have a tendency to clog the courts with protracted litigation. Although this might put an end to anti-trust violations, it could, as Justice Jackson pointed out in *Bruce's Juices*,[9] have a devastating effect upon all business.

I would reverse the decision below.

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[9] 330 U. S. 743, 754 (1947).

APPENDIX B

No. 13,775

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

TAMPA ELECTRIC COMPANY, *Appellant*, v. NASHVILLE COAL COMPANY, NASHVILLE COAL, INC., and WEST KENTUCKY COAL COMPANY, *Appellees*.	Appeal from the United States District Court for the Middle District of Tennessee, Nashville Divison.

JUDGMENT

(Filed April 4, 1960)

Appeal from the United States District Court for the Middle District of Tennessee.

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Tennessee, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

Approved for entry:

/s/ SHACKELFORD MILLER, JR.
United States Circuit Judge

APPENDIX C

IN THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION
CIVIL ACTION NO. 2418

TAMPA ELECTRIC COMPANY,
Plaintiff,

v.

NASHVILLE COAL COMPANY, ET AL.
Defendants.

Received for Entry 11:15 A.M.
Nov 18 1958
JOHN O. ANDERSON, Clerk
By FRANK WILLIAMS D. C.

OPINION

This is an action for a declaratory judgment seeking to establish that a certain contract referred to as the Potter-Tampa contract is valid and enforceable and binding upon both the plaintiff and the defendants.

The defendants, hereinafter sometimes referred to as the Seller, have moved the Court for summary judgment, contending that there are no issues of fact to be decided by the Court, and that the undisputed facts establish the illegality of the contract under Section 3 of the Clayton Act and Sections 1 and 2 of the Sherman Act. The plain-

tiff, Tampa Electric Company, hereinafter sometimes referred to as the Buyer, has also moved for summary judgment, insisting that the Potter-Tampa contract upon the basis of the undisputed facts is valid and enforceable. The Buyer is a large electric utility company serving Tampa, Florida, and its metropolitan area. Prior to the Potter-Tampa contract, oil was the only fuel used by the Buyer in its production of electric power. It is at present constructing a new plant or station near Tampa, known as the Gannon Station, which will eventually contain six separate power-producing units. Two of these units have been completed and are using coal as fuel, and a third coal-burning unit is under construction.

The contract in issue was made May 23, 1955 between the Tampa Electric Company and Justin Potter and David K. Wilson, co-partners doing business as the Potter Towing Company. After a series of transfers Nashville Coal Company, Inc., a wholly owned subsidiary of West Kentucky Coal Company, succeeded to the Potter-Wilson position under the contract. The West Kentucky Coal Company then made an agreement with Potter and Wilson to indemnify them against any loss resulting from nonperformance of the Potter-Tampa contract. After all transfers of the contract had been completed the Seller refused to perform on the ground that it was in violation of the Clayton and Sherman Acts, and subsequently the Buyer filed this action for declaratory judgment.

The terms of the Potter-Tampa contract are substantially as follows: The Seller agrees to provide the Buyer and the Buyer agrees to purchase from the Seller all the coal required as fuel for the production of electric energy at the Gannon Station for a period of 20 years. The first two units of the plant now in operation will use coal as

fuel, and as to these units "the full requirements shall not be less than 225,000 tons of coal per unit per year". It is agreed that a third unit now under construction will also use coal, and that all future units constructed will be supplied by the Seller if the Buyer elects to use coal as fuel. It is further stipulated that two years' notice will be given the Seller as to whether or not coal will be used in future units. The contract price is fixed at a minimum of $6.85, less a minimum rebate of 45 cents per ton for the first eighteen months and 30 cents per ton thereafter. There is no provision in the contract as to other plants now in operation or plants which might be constructed in the future, the contract applying only to the Gannon Station.

It is estimated by the Buyer that within a very few years the Gannon Station will consume more coal than is presently consumed in the entire State of Florida. Peninsular Florida's present coal consumption is approximately 700,000 tons per year as compared to the 450,000 tons required by the Potter-Tampa contract as a minimum for the first two units at the Gannon Station. The Buyer is presently purchasing coal for the first two units from Love and Amos Coal Company under a contract which is subject to cancellation on twelve months' notice by the Buyer, or subject to immediate cancellation should the Seller begin to perform under the Potter-Tampa contract.

It is the contention of the Seller that the Potter-Tampa contract is invalid under Section 3 of the Clayton Act in that it is an agreement or understanding not to purchase the product of the Seller's competitors and as such its effect is to substantially lessen competition. The relevant provisions of Section 3 are as follows:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease

> or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States * * * on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods * * * of a competitor or competitors of the * * * seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

To sustain the validity of the contract the Buyer insists, first, that the Potter-Tampa contract does not fall within the scope of Section 3 in that it does not have the effect of requiring that the purchaser shall not use the goods of a competitor of the Seller. In support of this argument it is pointed out that the Buyer, consistently with the Potter-Tampa contract, may use oil as a fuel in the remaining three units at the Gannon Station, and that it may use the coal of a competitor of the Seller in any future plant to be constructed and in any present oil-burning plant converted to the use of coal. However, in the present case the Court is persuaded that the Potter-Tampa contract is a requirements contract having the effect of requiring the Buyer not to use the goods of a competitor of the Seller within the intent and meaning of Section 3. It clearly provides, in effect, that the Buyer must buy only from the Seller all of its coal for the two units now in operation and for the additional unit now under construction at the Gannon Station, representing in fact all of the Buyer's present coal requirements. According to the Buyer's estimation, it will require 1,000,000 tons of coal per year at the Gannon Station by 1961. A con-

tract to supply the total coal requirements of an operation of such magnitude for such a protracted exclusionary period clearly falls within the purview of the statute. The question must be decided upon the basis of realities and the contract construed reasonably in the light of existing facts. It is true that coal could conceivably be used in future plants or by converting existing plants, but there is no evidence that this is presently planned. While the possibilities suggested do exist the unalterable fact remains that the contract at issue is one which "pre-empts" or "engrosses" all of the known coal requirements of the Buyer—manifestly a large and substantial volume of commerce—for a period of 20 years.

This conclusion as to the effect of the contract under the Clayton Act is supported by the decision of the Supreme Court in International Salt Co., Inc. v. United States, 332 U. S. 392, 60 S. Ct. 12, 91 L. Ed. 20, in which the International Salt Company required tying arrangements wherein the lessees of its patented machines could use only salt purchased from the lessor. In the year 1944 the company sold approximately 119,000 tons of salt for about $500,000 for use in its leased machines. The tying clause in practically all of its leases required the lessee to purchase from the lessor all unpatented salt and salt tablets consumed in the leased machines. The Government moved for summary judgment which was sustained by the trial court. On appeal the International Salt Company insisted that summary judgment was unauthorized because it precluded trial of alleged issues of fact as to whether the restraint was unreasonable within the Sherman Act or substantially lessened competition or tended to create a monopoly in salt within the Clayton Act. In rejecting this

argument and in holding that the tying agreements were illegal the Court stated:

> "We think the admitted facts left no genuine issue. Not only is price-fixing unreasonable, per se, United States v. Socony-Vacuum Oil Co., 310 U. S. 150; United States v. Trenton Potteries Co., 273 U. S. 392, but also it is unreasonable, per se, to foreclose competitors from any substantial market. Fashion Originators Guild v. Federal Trade Commission, 114 F. 2d 80, affirmed, 312 U. S. 457. The volume of business affected by these contracts cannot be said to be insignificant or insubstantial and the tendency of the arrangement to accomplishment of monopoly seems obvious. Under the law, agreements are forbidden which 'tend to create a monopoly', and it is immaterial that the tendency is a creeping one rather than one that proceeds at full gallop; nor does the law await arrival at the goal before condemning the direction of the movement." (332 U. S. p. 396)

It was regarded as immaterial by the Court that the leases provided that if competitors offered salt of an equal grade at a lower price the lessee should be free to buy in the open market unless the lessor would furnish the salt at an equal price, and further that the lessee was entitled to any benefit of any general price reduction in the lessor's salt tablets. It was found that these provisions, while affording some measure of protection to the lessee, did not avoid "the stifling effect of the agreement on competition". Thus the decision would appear to stand for the proposition that a violation of Section 3 occurs if a substantial amount of business is removed from the area of competition even though there remains the possibility of use of a competitor's product.

Appendix C

Other decisions are to the same effect, i.e., that the possibility that a buyer might use a competitor's product does not exempt exclusive contractual arrangements from the condemnation of the Clayton Act. Judson L. Thomson Mfg. Co. v. Federal Trade Commission, 1st Cir. 150 F. 2d 952, cert. denied, 326 U. S. 776, 66 S. Ct. 267, 90 L. Ed. 469; Signode Steel Strapping Co. v. Federal Trade Commission, 4 Cir. 132 F. 2d 48. The case of Federal Trade Commission v. Sinclair Refining Co., 261 U. S. 463, 43 S. Ct. 450, 67 L. Ed. 746, relied on by the Buyer, is deemed to be distinguishable because the lease involved left the buyer "free to buy wherever he chooses", or "to discontinue any or all" dealings with the Seller, whereas in the present case the Buyer is committed for a period of 20 years to purchase from one Seller alone all coal consumed at one of its major plants.

The undisputed facts establish that the Gannon Plant's coal requirements will soon exceed in fuel equivalent all of the oil burned at the Buyer's other two plants. It is estimated that after 1961 the Buyer's coal requirements will increase as required to about 2,250,000 tons per year. Under the terms of the Potter-Tampa contract the Seller, alone, would have the opportunity to furnish this large amount of coal to the Buyer.

The Buyer's argument that the Potter-Tampa contract is not a requirements contract because coal competes with other fuel is not only contrary to the express language of Section 3, but it is also untenable when the decisions construing Section 3 are considered. It is true that oil is the fuel used in all plants operated by the Buyer other than the Gannon Station, and that oil could be used in the last three units to be built at the Gannon Station. But this fact becomes immaterial in view of the express

language of Section 3 that an exclusionary agreement is unlawful where its effect may be to substantially lessen competition "in any line of commerce".

Although both oil and coal are fuels, each is a separate and distinct line of commerce. Thus it was held in George Van Camp & Sons Co. v. American Can Company, et al., 273 U. S. 245, 253, 49 S. Ct. 112, 73 L. Ed. 311, with reference to another section of the Clayton Act using identical language:

> "The phrase is comprehensive and means that if the forbidden effect or tendency is produced in one out of all the various lines of commerce the words 'in any line of commerce' literally are satisfied."

And in United States v. E. I. duPont de Nemours & Co., et al., 353 U. S. 586, 593, 77 S. Ct. 872, 1 L. Ed. 2d 1057, the Supreme Court in ruling that automotive finishes and fabrics were a separate line of commerce from other similar materials, stated:

> "* * * automotive finishes and fabrics have sufficient peculiar characteristics and uses to constitute them products sufficiently distinct from all other finishes and fabrics to make them a 'line of commerce' within the meaning of the Clayton Act."

The Buyer further argues that the Potter-Tampa contract not only did not stifle or lessen competition but actually stimulated or increased it by introducing coal to Peninsular Florida and breaking the oil monopoly. It is pointed out that on the basis of the most recent figures at the time the contract was entered into coal accounted for less than 6 per cent of the fuel consumed in the entire state of Florida, and that every power-generating unit in Peninsular Florida burned oil in its boilers. It is said

that discounting the Panhandle of Florida where all of the natural gas is consumed Peninsular Florida has been monopolized by oil. It is further argued that until coal was first burned in the units at Gannon Station a year ago there was virtually no challenge to oil's stranglehold in Peninsular Florida, and that this contract, therefore, created competition where none had existed before. Conceding that coal is a newcomer to the Florida market and that its use by the Tampa Electric Company might stimulate the market and induce other consumers to convert to coal, the Court is of the opinion that this possibility does not save the contract in issue from illegality under Section 3 of the Clayton Act. Inquiries of this kind were expressly rejected as irrelevant in Standard Oil Company of California, et al. v. United States, 337 U. S. 293, 69 S. Ct. 1051, 93 L. Ed. 1371. In that case the Standard Oil Company had made numerous contracts with independent dealers to supply their full requirements for certain "Standard" products for a period of six months. There was no evidence that competition had actually decreased, but the Court held that Section 3 of the Clayton Act did not require such proof in order to establish a violation of its terms. In this connection it was stated:

> "• • • To interpret that section as requiring proof that competition has actually diminished would make its very explicitness a means of conferring immunity upon the practices which it singles out • • •" (337 U. S. p. 311).

The Court then concluded:

> "We conclude, therefore, that the qualifying clause of Section 3 is satisfied by proof that competition has been foreclosed in a substantial share of the line of commerce affected. It cannot be gain-

> said that observance by a dealer of his requirements contract with Standard does effectively foreclose whatever opportunity there might be for competing suppliers to attract his patronage, and it is clear that the affected proportion of retail sales of petroleum products is substantial. In view of the widespread adoption of such contracts by Standard's competitors and the availability of alternative ways of obtaining an assured market, evidence that competitive activity has not actually declined is inconclusive. Standard's use of the contracts creates just such a potential clog on competition as it was the purpose of Section 3 to remove wherever, were it to become actual, it would impede a substantial amount of competitive activity" (337 U. S. p. 314).

A similar situation exists in the present case, there being no direct evidence that competition would actually decrease as a result of performance of the contract. It is conceivable that competition might increase due to the introduction of a product into a comparatively new market. But the inescapable fact persists that the Potter-Tampa contract for a period of 20 years excludes competitors of the Seller from a substantial amount of trade, although as the plaintiff asserts, the Seller was only one of 700 coal producers who could serve the same market. The contract is exclusionary to such a degree and the volume of commerce affected is manifestly so large that there is no escape from the conclusion that its effect under the circumstances disclosed is to "probably lessen competition or create an actual tendency to monopoly", to use the words of the Supreme Court in Standard Fashion Company v. Magrane-Houston Co., 258 U. S. 346, 357, 42 S. Ct. 360, 66 L. Ed. 653, language re-approved in Standard Oil Company of California v. United States, supra.

Appendix C

One reason for rejecting the argument in Standard Oil that actual lessening of competition must be shown was the difficulty which the courts would encounter in adopting a proper standard of proof for such cases. It was observed that "to require firm prediction of an increase of competition as a probable result of ordering the abandonment of the practice, would be a standard of proof, if not virtually impossible to meet, at least most ill-suited for ascertainment by courts."

It is vigorously argued by the plaintiff that the Clayton Act does not apply to a requirements contract when the seller does not occupy a sufficiently powerful position in the market to enable him to assert "leverage" over the buyer. This argument is stated in the plaintiff's brief as follows:

> "Even assuming that the contract at issue required plaintiff to purchase all of its fuel requirements from the defendants for a period of twenty years there is nothing in the anti-trust laws themselves nor in any case construing them which would outlaw the contract. It is abundantly clear from an examination of the legislative history of Section 3 of the Clayton Act as well as the cases applying that section to so-called 'requirements contracts', that the sole evil sought to be prohibited was a practice, very prevalent when the Clayton Act was adopted in 1914, whereby a seller who, by means of the economic leverage arising from a patent or from substantial economic control of a unique and desirable article, tied up a substantial portion of the retail or manufacturing market by requiring retail dealers or manufacturers who wished to deal in his particular goods or utilize his patent to agree not to deal in the goods of a competitor. Clearly the contract here in issue bears no resemblance whatever to such agreements."

But here also it would appear that the plaintiff's argument is repelled by the decision in Standard Oil Company of California, supra. In referring to market dominance the court in that case held that the requirements contracts violated Section 3, even though:

> "• • • Standard's share of the retail market for gasoline, even including sales through company-owned stations, is hardly large enough to conclude as a matter of law that it occupies a dominant position, nor did the trial court so find • • •". (337 U. S. p. 302)

Times-Picayune Publishing Co. et al. v. United States, 345 U. S. 594, 73 S. Ct. 872, 97 L. Ed. 1277, held that both proof of dominance in the market for the tying product and a showing that an appreciable volume of business in the tied product is restrained are essential conditions to judicial condemnation of a tying clause as a per se violation of the Sherman Act. But in the same case the court made it clear in its opinion that under the narrower standards of Section 3 of the Clayton Act either proof of market dominance or proof of restraint of a substantial volume of commerce would suffice to establish a violation. Thus, the court stated:

> "From the 'tying' cases a perceptible pattern of illegality emerges: When the seller enjoys a monopolistic position in the market for the 'tying' product, *or* if a substantial volume of commerce in the 'tied' product is restrained, a tying arrangement violates the narrower standards expressed in Section 3 of the Clayton Act because from either factor the requisite potential lessening of competition is inferred." (345 U. S. p. 608)

The same distinction between the Sherman Act and the more limited and particularized provisions of the Clayton Act is to be borne in mind in considering Northern Pacific Railway Co., et al. v. United States, 356 U. S. 1, 78 S. Ct. 514, 2 L. Ed. 2d 545. The language of the court with respect to monopoly power or market dominance or control is limited to the facts of the case before the Court involving a tying agreement which was alleged to constitute an unreasonable restraint of trade under the general provisions of Section 1 of the Sherman Act. A Section 3 Clayton Act violation was neither claimed nor considered.

The wording of the statute itself lends no support to the argument that economic leverage or market dominance is a prerequisite to its violation and for this reason the effort to rely upon the legislative history of the Clayton Act would appear to be futile. The Court is of the opinion that the rationale of the court in Standard Fashion Company v. Magrane-Houston Co., supra, is applicable. In that case the court, in speaking of the legislative history of the Clayton Act, stated:

> "Much is said in the briefs concerning the Reports of Committees concerned with the enactment of this legislation, but the words of the act are plain and their meaning is apparent without the necessity of resorting to the extraneous statements and often unsatisfactory aid of such reports." (258 U. S. p. 356)

Nor is there any merit in the plaintiff's contention that the Clayton Act applies only to instances where numerous contracts with various dealers are involved and not to a case of a single seller and a single buyer. This position is not sustained by authority and no support can

be found for it in the language or the purpose of the statute. Both language and purpose would be ignored if multiple buyers or sellers were held to be necessary to its violation.

The final contention of the plaintiff that Section 3 should not be applied where the buyer desires that the contract be performed is also without substance. The illegality of the contract under Section 3 renders it unenforceable at the suit of either party. In National Transformer Corp., et al. v. France Mfg. Co., 6 Cir. 215 F. 2d 343, 361, the court said:

> "It may be here emphasized that a contract which cannot be performed without violation of a statute is illegal and void. Where parties are in pari delicto, the law will leave them where it finds them, and all relief is refused because of the public interest * * *. The defendant may assert the invalidity of an agreement, even though he is a participator in the wrong * * *. The defense of illegality is allowed, not as a protection to the defendant, but as a disability to the plaintiff."

It may be conceded that there are doubtless economic benefits inherent in the use of a requirements contract of this type, and that it seems somewhat harsh to invalidate such a contract, particularly when entered into by the parties of their own free will, in the evident belief that it was mutually advantageous, and without compulsion or constraint. But the Court's function is not to determine whether the contract is advantageous or desirable from the standpoint of the parties or of the public but whether it is legal. Under the circumstances of this record the two essential conditions are shown to invalidate the contract under Section 3 of the Clayton Act regardless of its

merits or beneficial effects otherwise: First, the contract within the sense and meaning of Section 3 is one requiring the buyer not to use or deal in the goods of a competitor of the seller; and Second, the effect of the contract is to substantially lessen competition in a line of commerce. Since the Court is of the view that the contract is so condemned, its status under the Sherman Act need not be determined.

As the material facts shown by the pleadings, affidavits, and other pertinent papers, are not in dispute and no genuine issue of fact is involved, it follows that the defendant's motion for a summary judgment should be sustained and the plaintiff's similar motion overruled.

An appropriate form of judgment will be passed to the Court to implement this opinion declaring the rights of the parties accordingly.

(s) WILLIAM E. MILLER
United States District Judge

APPENDIX D

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION
CIVIL ACTION NO. 2418

TAMPA ELECTRIC COMPANY,
Plaintiff,
v.
NASHVILLE COAL COMPANY, ET AL.,
Defendants.

Received for Entry 9:15 AM
Dec 4 1958
JOHN O. ANDERSON, Clerk
By FRANK WILLIAMS

FINAL JUDGMENT

The complaint in this action having prayed for a judgment declaring that a certain described contract for the sale of goods to plaintiff, entered into on May 23, 1955, and thereafter supplemented and amended on September 21, 1955 and February 8, 1956, in respect of which the defendants had succeeded to the rights and obligations of the original seller, "is a valid, lawful and enforceable contract and is binding upon the plaintiff and defendants, according to its terms"; and

Defendants having filed their answer, alleging that the said contract "is illegal, void and unenforceable", due to

its violation of the antitrust laws of the United States, and praying that the complaint be dismissed with prejudice; and

A motion and cross-motion for summary judgment under Rule 56, together with supporting affidavits and memoranda of law, having been respectively filed by defendants and plaintiff, wherein the parties asserted and agreed that there was no genuine issue between them as to any material fact; and

Oral argument on said motions having been heard by the Court on July 31, 1958, following which additional memoranda were filed by both parties and an additional affidavit was filed by plaintiff; and

The Court having considered all pleadings, affidavits and memoranda filed herein, and having found from the parties' undisputed allegations of fact, and their uncontroverted sworn statements of fact, and also from their admissions of fact (including admissions of fact disclosed in their memoranda), that there is no genuine issue between them as to any material fact and no disputed or controversial question of fact to be submitted for trial; and

The Court having decided, upon the basis of the findings of fact and conclusions of law set forth in its opinion, filed herein November 18, 1958, that defendants are entitled to judgment as a matter of law;

IT IS HEREBY ORDERED, DECLARED, ADJUDGED AND DECREED:

1. The contract of May 23, 1955, as supplemented and amended, between the plaintiff, an original party thereto, and the defendants, as successors to the rights and obligations thereunder of Justin Potter and David K. Wilson, co-partners doing business as Potter Towing Company, is

in violation of Section 3 of the Act of Congress approved October 15, 1914, commonly known as the Clayton Act, 15 U. S. C. §14, in that, within the meaning of that Act, it requires a purchaser of goods not to use or deal in the goods of a competitor of the seller and has the effect of substantially lessening competition in a line of commerce.

2. By reason of its aforesaid violation of the Clayton Act, said contract is illegal, void and unenforceable.

3. Plaintiff has no cause of action, and is entitled to no relief, against any or all of the defendants on account of the repudiation of said contract or of the failure, neglect or refusal of any or all of the defendants to perform any acts or undertakings in respect of said contract.

4. Plaintiff's complaint for declaratory judgment and this action be and they are hereby finally dismissed on the merits and with prejudice.

5. Defendants are entitled to have and recover from plaintiff their costs in this action and to have execution therefor.

WM. E. MILLER
United States District Judge

Entered Dec. 4, 1958.

Consented to as to form:

WINTHROP, STIMSON, PUTNAM & ROBERTS
HOOKER, KEEBLE, DOBSON & HARRIS
Attorneys for Plaintiff

ARNOLD, FORTAS & PORTER
BASS, BERRY & SIMS
Attorneys for Defendants

APPENDIX E

EXCERPTS FROM STATUTORY HISTORY PERTAINING TO SECTION 3 OF THE CLAYTON ACT.

In its Analysis of the Bill, the House Report [H.R. Rep. No. 627, 63rd Cong., 2d Sess. (May 6, 1914)], which was incorporated into the Senate Report [S. Rep. No. 698, 63rd Cong., 2d Sess. (July 22, 1914)], considered the effect of Section 3 of the Clayton Act and at length spoke of the evils sought to be condemned:*

> "* * * Let us therefore consider what this section really accomplishes. It prohibits the exclusive or 'tying' contract made between the manufacturer and the dealer by purchase or lease, whereby the latter agrees, as a condition of his contract, not to use or deal in the commodities of the competitor or rival of the seller or lessor. It is designed merely to prevent this unfair trade practice now so common throughout the country, and which is generally regarded by everyone who has given the subject any serious consideration as unjust to the local dealer

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* Section 3 as finally enacted was an amended version of Section 4 of the bill as originally passed by the House of Representatives, and, at that time, read as follows:

> "That any person engaged in commerce who shall lease or make a sale of goods * * * on the condition or understanding that the lessee or purchaser thereof shall not use or deal in the goods * * * of a competitor or competitors of the lessor or seller shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both, in the discretion of the court." H. R. Rep. No. 627, 63rd Cong., 2d Sess., 2 (May 6, 1914).

Before its enactment as Section 3 the criminal sanctions were stricken and the qualifying clause "where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce" was added. Otherwise, the language is substantially the same.

and to the community and as monopolistic in its effects. • • •

"• • • Where the concern making these contracts is already great and powerful, such as the United Shoe Machinery Co., the American Tobacco Co., and the General Film Co., the exclusive or 'tying' contract made with local dealers becomes one of the greatest agencies and instrumentalities of monopoly ever devised by the brain of man. It completely shuts out competitors, not only from trade in which they are already engaged, but from the opportunities to build up trade in any community where these great and powerful combinations are operating under this system and practice. By this method and practice the Shoe Machinery Co. has built up a monopoly that owns and controls the entire machinery now being used by all great shoe manufacturing houses of the United States. No independent manufacturer of shoe machines has the slightest opportunity to build up any considerable trade in this country while this condition obtains. • • •

"• • • The system is wholly bad for consumers and the general public, and in its last analysis detrimental to the interests of local dealers generally. We have penalized this practice under the provisions of section 4 [now section 3] and made it a misdemeanor punishable as prescribed in the section." H. R. Rep. No. 627, 63rd Cong., 2d Sess., 10-13 (1914).

Appendix E

Congressman Webb, a member of the House Committee on the Judiciary, to which the bill had been referred, after outlining the bill to the House of Representatives, described its purpose as follows:

> "• • • I contend, Mr. Chairman, that no one has the right to sell goods to a purchaser and receive his money for them and at the same time compel such purchaser to refuse to sell a competitive article. Such contract in itself is in restraint of trade and tends directly to monopoly. This practice has been in vogue in the United States for 20 years, and there is scarcely a retail merchant throughout this broad land who has not suffered from such practice, because our country has been literally plastered with these exclusive-sale contracts. • • •" 51 Cong. Rec. 9072 (May 22, 1914).

Congressman Webb later amplified this view:

> "It means simply this, that if I am a manufacturer or a wholesaler, and go to a small town and pick out the most popular merchant in that town —I have advertised my goods well—and, of course, naturally he is anxious to buy them. I go to this most popular merchant and tell him that I will let him buy my goods, provided he will not sell or carry in stock any of my competitor's goods. Now, I do not know how other gentlemen may look at such a contract, but that contract, in my opinion, is in and of itself a contract in restraint of trade. • • •" 51 Cong. Rec. 9406 (May 28, 1914).

• • •

> "• • • I do not believe there is a man on either side of the House who will say that it is right or

fair business for a manufacturer to make a contract with the merchant to sell only his goods and that he shall not sell goods that compete with his. It ought not to be allowed." 51 Cong. Rec. 9407 (May 28, 1914).

* * *

"It prevents the manufacturer from going to a little or big merchant and selling goods to him on condition that the merchant shall sell only his goods and not sell the goods of any competitor, and I ask both Republicans and Democrats on the floor of this House to give their support to that proposition, because it is good business morals, and it is a long step toward unfettering the little business man all over the country, and it will make the little country merchant feel that he can furnish supplies of all sorts and varieties to his customers instead of forcing them to go to the big mail-order houses to get what they want because they can not find the goods on the shelves of their local merchant." 51 Cong. Rec. 9407 (May 28, 1914).

Congressman Floyd, also a member of the House Judiciary Committee, stated:

"* * * The object of this section is to break up the power of giant monopoly and to liberate and free every small dealer in this land and put him in a position of independence in which he can do business in competition with any other business man in this country. * * *" 51 Cong. Rec. 9160 (May 23, 1914).

He described the practice sought to be outlawed by then Section 4 of the Clayton Act:

"* * * That is, a manufacturer goes to a merchant in town and agrees with him that if he will handle his goods exclusively and enter into a contract that

> he will not handle the goods of any other competitor in his line of business he will sell him the goods at a lower price and will give him a rebate at the end of a certain time or take back the remnant of the goods if he fails to sell them, exacting of the purchaser full payment for the goods, and then refusing to allow him to sell in that store the commodities of any competitor." 51 Cong. Rec. 9161 (May 23, 1914).

Congressman Taggert, who also was a member of the House Judiciary Committee, declared:

> "Section 4 of the bill will afford relief to retail dealers, who are now required by wholesalers to handle certain articles exclusively and become sole agents for certain goods * * *." 51 Cong. Rec. 9198 (May 25, 1914).

Senator Reed, a member of the Senate Committee on the Judiciary, to which the Senate bill had been referred, stated:

> "* * * What the bill aims at is the case of a vendor of goods, selling them to a dealer upon the express provision, not that the dealer will handle his goods, but that the dealer will not handle anybody else's goods, thus depriving the public of the opportunity to buy both classes of goods over the same counter and in actual competition, and also depriving the dealer of his opportunity to buy in the open market and from whomsoever he pleases." 51 Cong. Rec. 14270 (August 26, 1914). See also 51 Cong. Rec. 14226 (August 25, 1914).

* * *

In the hearings before the House Committee on the Judiciary, on February 26, 1914, Herbert Noble, an attorney, addressed the Committee on behalf of his client,

Appendix E

John A. Roebling Sons Co., bridge builders who were also manufacturers of wire rope. Mr. Noble expressed concern lest Section 3 should be construed to ban the wire rope requirements contracts Roebling had made with sundry industrial consumers. With Representative Clayton presiding in the Chair, Representative Charles C. Carlin of Virginia, a member of the Judiciary Committee, replied to Mr. Noble's queries as follows:

> "Mr. Carlin: I do not think this statute covers that.
>
> "Mr. Noble: It says you may not make an exclusive contract to buy all your goods from one man.
>
> "Mr. Carlin: No; it does not. It simply says a man shall not require you to make an exclusive contract to sell his goods only.
>
> * * * *
>
> "Mr. Noble: Do you mean the word 'dealing' only refers to jobbers and not to consumers?
>
> "Mr. Carlin: That statute has no reference to consumers. It is intended to apply to merchants generally. * * *" Hearings before the Committee on the Judiciary of the House of Representatives on the Clayton Bill, 63rd Cong., 2d Sess., 966-67 (1914).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 931

TAMPA ELECTRIC COMPANY, *Petitioner,*

v.

NASHVILLE COAL COMPANY, NASHVILLE COAL, INC. and WEST KENTUCKY COAL COMPANY, *Respondents.*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUMMARY STATEMENT

Petitioner brought this action for a declaratory judgment declaring that the contract in issue "is a valid, lawful and enforceable contract and is binding upon the plaintiff and defendants according to its terms" (R. 7a).[1] It now seeks certiorari from a decision of the Sixth Circuit affirming the decision of the District Court for the Middle District of Tennessee denying the relief sought (Wm. E. Miller, J.). Both

[1] The designation "R" refers to the Appendices filed in the Court below. Appellant's (i.e., Petitioner's) Appendix comprises pages 1a-78a, inclusive, and Appellees' (i.e., Respondents'), pages 1b-3b, inclusive.

courts correctly and faithfully applied Section 3 of the Clayton Act to the undisputed facts of the case. They declined to lend the aid of the courts to the enforcement of an executory, twenty-year requirements contract: That is, a contract which *for twenty years* confined the huge coal requirements of petitioner to a single supplier, and which thereby excluded from the major coal market of the State of Florida any supplier other than the contracting vendor.

The coal engrossed by the contract far exceeds the total annual consumption of coal in the State of Florida by other users. Its dollar value, over the twenty-year life of the contract, is in excess of $128,000,000. (Pet., App. A, p. 11a).

The present case is unusual in antitrust litigation because of the extent and degree to which each of the points involved has already been settled by decisions of this Court. Petitioner's brief is necessarily based upon an effort to distinguish these decisions so as neatly to exclude the present case from the ambit of Section 3, notwithstanding this Court's prior holdings.

Petitioner also claims that the present decision is in conflict with the decision of the Seventh Circuit in *Beloit Culligan Soft Water Service, Inc.* v. *Culligan, Inc.*, 274 F. 2d 29 (7th Cir. 1959), in which certiorari has not been sought. This is clearly unfounded, as the Court of Appeals below held. (Pet., App. A, p. 13a). *Culligan* did *not* enforce a requirements contract which violated Section 3. It correctly recognized and stated that it could not and would not enforce such a contract, since to do so would be "enforcing the specific conduct prohibited by the Act." As will appear, pp. 22-23 *infra*, it enforced a *partially executed* franchise agreement

only after the invalid requirements provisions had been excised.

Petitioner's final point is that the invalidity of the contract may not be asserted by the seller in defense of this action for declaratory judgment. This position is refuted by the principle recognized by this Court in *Kelly* v. *Kosuga*, 358 U.S. 516, 520 (1959), that judicial assistance is not available when "the judgment of the Court would itself be enforcing the precise conduct made unlawful by the Act." Petitioner does not discuss the *Kelly* case.

For the reasons herein set forth, we respectfully submit that this Court should not grant the petition for certiorari.

THE FACTS

1. The Contract and the Market

Briefly stated, petitioner and respondents' predecessor entered into a contract under which the seller was "to supply the *total requirements* of fuel of the Buyer for the operation of its first two units to be installed at [Buyer's] Gannon Station . . . which fuel requirements shall be not less than 225,000 tons of coal per unit per year". It was further agreed that if "during the first 10 years of the term of this contract the Buyer constructs additional units in which coal is used as the fuel . . . the fuel requirements thereof shall be added to this contract and be furnished by the Seller and accepted by the Buyer." (R. 9a-10a, emphasis supplied). A third coal-burning unit was in fact under construction when the suit was brought and more were planned. (Pet., pp. 4, 6).[2]

[2] As to the additional units, the Buyer could decide whether coal or some other fuel was to be used (R. 10a).

The Gannon units were petitioner's only coal-burning units, and the coal engrossed by the contract was the petitioner's total requirements—for twenty years. As shown by the record, the petitioner's actual requirements for each of the years 1959 and 1960 were estimated by it as 700,000 tons, and for 1961, as 1,000,000 tons. Petitioner estimated that its needs would "increase as required to about 2,250,000 tons per year." (R. 36a).

These requirements are indeed huge: They far exceed petitioner's total fuel consumption in its oil installations, which correspond to 825,000 tons of coal (R. 43a; 65a). They far exceed the total amount of coal otherwise consumed in the entire State of Florida —i.e., about 700,000 tons (R. 60a). Based only on petitioner's requirements for 1960 of 1,000,000 tons (which it states will increase to 2,250,000 tons), the dollar value of coal engrossed is $6,400,000 annually or $128,000,000 over the twenty year period (Pet., App. A, p. 11a).

At the time that petitioner filed the present action for declaratory judgment, no coal had been delivered under the contract (R. 7a). Suitable coal was and is available from many suppliers. Petitioner admits that the Seller was "only one of some 700 coal producers who could serve" its needs. (R. 68a; 1b).[3]

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[3] Petitioner's president testified as follows in a 1958 proceeding before the Florida Railroad and Public Utilities Commission (R. 2b):

"Q. Now, have you contacted any other company to see——

A. Coal companies?

Q. Coal companies.

A. We have coal companies in and out of our office so fast that

In fact, petitioner later made a contract, to replace the contract in issue, with Love & Amos Coal Company for specified tonnages of coal on a twelve-month basis: That is, the contract expressly provides "Cancellable on 12 months notice by supplier or purchaser." (R. 36a).

2. This Action

Petitioner brought this action for declaratory judgment, expressly to enforce the contract. It recited the fact that respondents had notified petitioner that the contract as drawn was invalid under Section 3 of the Clayton Act; and it prayed for a judgment declaring:

> "That said contract dated May 23, 1955 is a valid, lawful and enforceable contract and is binding upon the plaintiff and defendants, *according to its terms.*" (R. 7a; emphasis supplied.)

On motions for summary judgment by both petitioner and respondent, the District Court, in an able opinion (Pet., App. C), entered judgment dismissing the complaint. The Court of Appeals affirmed (Miller and Cecil, JJ; Weick, J., dissenting; Pet., 9 App. A).

STATUTES INVOLVED

Both lower courts disposed of the case under Section 3 of the Clayton Act (38 Stat. 731, 15 U.S.C. § 14). In pertinent part, this section provides:

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the receptionist doesn't know where to seat them to give them time to talk to people.

• • • • •

A. We have received innumerable offers of coal at various prices per ton. I couldn't possibly sit here and remember which price of coal per ton related to the BTU's per pound or any number of such things."

> "It shall be unlawful for any person . . . to lease or make a sale or contract for sale of goods . . . for use, consumption, or resale . . . on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

Respondents also challenged the contract as unlawful under Sections 1 and 2 of the Sherman Act (26 Stat. 209, as amended, 15 U.S.C. §§ 1-2), but the courts below did not find it necessary to consider the Sherman Act questions (Pet., App. A, p. 13a; App. C, p. 51a).

QUESTIONS PRESENTED

1. Did the courts below err in refusing, under Section 3 of the Clayton Act, to issue a declaratory judgment declaring to be valid and enforceable, a contract which for twenty years commits a Florida public utility to buy from a single vendor, to the exclusion of hundreds of other willing and available sellers, all of the coal required by the utility's only coal-burning facility, in amounts exceeding 1,000,000 tons and $6,400,000 per year—or more than the total annual coal consumption of the State of Florida when the contract was made—and aggregating at least 20,000,000 tons and $128,000,000 over the twenty-year life of the contract?

2. May a declaratory judgment be entered declaring such a contract valid and enforceable notwithstanding the provisions of Sections 1 and 2 of the Sherman Act?

REASONS FOR DENYING THE WRIT

The petition for a writ of certiorari should be denied because the decision below is clearly correct in its application of Section 3 of the Clayton Act; because the courts below faithfully applied the antitrust laws, pursuant to their terms as construed by this Court; because the decision below follows settled law established by prior decisions of this Court; because the decision raises no new question to warrant the Court's review; and because there is no conflict in the Circuits.

(1) *The contract is within the category prohibited by Section 3.* Petitioner's first argument is that the contract is not within the category defined by Section 3: That is, a contract "on the condition, agreement or understanding" that the buyer will not "use or deal in" goods of a competitor or competitors of the seller. This argument is manifestly untenable. *Standard Oil Co. of California* v. *United States*, 337 U.S. 293 (1949); *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U.S. 346 (1922); *Dictograph Products, Inc.* v. *Federal Trade Commission*, 217 F. 2d 821 (2d Cir. 1954), *cert. denied*, 349 U.S. 940 (1955); *Anchor Serum Co.* v. *Federal Trade Commission*, 217 F. 2d 867 (7th Cir. 1954).

The contract requires the buyer *for twenty years* to obtain from a single seller all the coal it requires for its present and projected requirements, to the exclusion of hundreds of competing sellers. Those requirements are extremely large—involving a sales volume exceeding $128,000,000. The tonnages to be delivered each year, from 1961 onwards, surpass the total annual purchases by all other coal buyers in the entire state of Florida. From these facts, the decision clearly follows, as a matter of law, that the contract is unlawful.

Standard Oil Co. of California v. *United States, supra*; *International Salt Co.* v. *United States*, 332 U.S. 392 (1947); see *Times Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 608 (1953).[4] There is no refuge for petitioner in the fact that the offensive agreement is limited in geographical scope to the area it serves or for that matter to a single city. See *Standard Oil Co. of California* v. *United States, supra*, 337 U.S. at 299, n. 5; compare *Montague & Co.* v. *Lowry*, 193 U.S. 38, 46 (1904); *Indiana Farmer's Guide Publishing Co.* v. *Prairie Farmer Publishing Co.*, 293 U.S. 268, 278-80 (1934); *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946); *United States* v. *Yellow Cab Co.*, 332 U.S. 218, 225-27 (1947); *Klor's, Inc.* v. *Broadway-Hale Stores*, 359 U.S. 207 (1959).[5]

The vice of the contract is compounded by its stipulated foreclosure of competition for an irreducible term of twenty years. As the three-judged trial court said of the 25-year exclusive contracts condemned in *United States* v. *Pullman Co.*, 50 F. Supp. 123, 129 (E.D. Pa. 1943), *aff'd.*, 330 U.S. 806 (1947):

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[4] The total volume of commerce engrossed in this case surpasses the total dollar volume cited in *Standard Oil Co. of California, supra*, 337 U.S. at 295-96 ($66,000,000), where the contracts were cancellable on short notice (*id.* at 296). On an annual basis—i.e., $6,400,000 per year (p. 4, *supra*)—it is more than 12 times the $500,000 per year held sufficient for purposes of Section 3 in *International Salt, supra*, 332 U.S. at 395, and also in the *Anchor Serum* case, *supra*, 217 F. 2d at 873.

[5] As this Court noted in *Standard Oil Co. of California, supra*, "§ 3 of the Clayton Act was directed to prohibiting specific practices even though not covered by the broad terms of the Sherman Act" (337 U.S. at 297), and it "set up an express prohibition against a practice thought to be beyond the reach of the Sherman Act" (*id.* at 312).

> "As a competition killer the long term contract is an effective weapon. . . . Even a patentee is not so secure against the passage of time."[6]

The period of the present contract, covering an entire generation, contrasts with the six month term of the requirements contracts condemned under Section 3 of the Clayton Act in *Standard Oil Co. of California, supra*, 337 U.S. at 296. It is twenty times the one-year period considered permissible for requirements contracts under Section 3 in *United States* v. *Linde Air Products Co.*, 83 F. Supp. 978, 982 (N.D. Ill. 1949), and under the Sherman Act in *United States* v. *American Can Co.*, 87 F. Supp. 18, 31 (N.D. Cal. 1949). It is far longer than the periods deemed excessive in both those cases. This inordinate duration of the present contract alone condemns it as an illegal suppression of competition.

The fundamental requisite for a competitive economy, as envisaged by the antitrust laws, is of course freedom of access by sellers and buyers to "outlets" and "sources" (*Fashion Originators' Guild of America, Inc.* v. *Federal Trade Commission*, 312 U.S. 457, 465 (1941)). This was emphatically reiterated by the

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[6] The antitrust laws forbid even a patentee to license his invention on terms preventing the licensee from using competitive processes or goods. *National Lockwasher Co.* v. *George K. Garrett Co.*, 137 F. 2d 255 (3rd Cir. 1943); *McCullough* v. *Kammerer Corp.*, 166 F. 2d 759 (9th Cir. 1948), *cert. denied*, 335 U.S. 813 (1948); *Dole Refrigerating Co.* v. *Kold-Hold Mfg. Co.*, 185 F. 2d 809, 816-17 (6th Cir. 1950), *modifying and affirming* 87 F. Supp. 323 (E.D. Mich. 1949).

In its exclusion of competing goods, the contract at bar embodies restraints which are improper under a lawful patent and for a term longer than the permissible 18 year life of a patent.

declaration of *International Salt*, *supra* (a tying case), that "it is unreasonable, *per se*, to foreclose competitors from any substantial market" (332 U.S. at 396).[1]

The complaint in this case seeks to induce the courts to vindicate precisely the result prohibited by the antitrust laws. It prays the Court to declare that this contract, foreclosing hundreds of the seller's competitors from a huge coal market, "is binding upon the plaintiffs and defendants, according to its terms" (p. 1, *supra*). Such a declaration would be squarely opposed to the established rule, recently restated by this Court in *Kelly* v. *Kosuga*, 358 U.S. 516, 520 (1959), that the courts will not enter a judgment which "would itself be enforcing the precise conduct made unlawful by the Act."

(2) *Coal is a "line of commerce", and a contract foreclosing competition within the coal industry for a twenty-year period is a violation of Section 3.* Petitioner seeks to avoid the effect of Section 3 by arguing that the contract covers only its requirements of *coal* for present and planned units; that it does not cover petitioner's requirements for oil used in other units; and that it does not cover requirements for coal if petitioner should some day decide to convert its oil-burning units to coal or to build a plant that is not covered by the contract.

The short and decisive answer to this argument is that coal and oil are not a single "line of commerce";

---

[1] The subject of the present case is a requirements contract, and does not involve the question of *per se* application either of Section 3 or of the Sherman Act. The Court of Appeals so noted (Pet. App. A, p. 7a). As both courts below held, the actual proof of the anticompetitive effect in the present case is overwhelming (Pet. App. A, pp. 10a-11a; App. C, pp. 40a-43a).

that coal is a separate and distinct "line of commerce" within the meaning of Section 3 of the Clayton Act; and that, to quote the Court of Appeals, "the remote possibility" that petitioner might possibly some day put itself in a position where it could use a competitor's coal "is an immaterial factor in the actual picture before the Court" (Pet., App. A, p. 9a). Rather, Section 3 applies, as the Court ruled, because "the contract requires the appellant to purchase all of its present, and its planned future, requirements of coal from a single seller" (*Ibid.*).

Both lower courts correctly decided that coal is a separate "line of commerce" from oil under Clayton Act standards (Pet., App. A., p. 9a; App. C., p. 44a). As they perceived, any other view is incompatible with this Court's construction of the identical phrase in Sections 2 and 7 of the Clayton Act. *George Van Camp & Sons Co.* v. *American Can Co.*, 278 U.S. 245, 253 (1929); *United States* v. *E. I. duPont de Nemours & Co.*, 353 U.S. 586, 593-94 (1957); see also *United States* v. *Bethlehem Steel Co.*, 168 F. Supp. 576, 595 (S.D.N.Y. 1958).

Coal and oil cannot be burned in the same equipment at petitioner's generating plants (Pet., p. 23). They are not interchangeable within the Clayton Act's frame of reference. For purposes of that statute, to quote *Van Camp*, *supra*, coal must be separately regarded as "*one* out of *all* the various lines of commerce" (278 U.S. at 253). Or to paraphrase the *duPont* case, *supra*, both coal and oil "have sufficient peculiar characteristics and uses . . . to make [each] a 'line of commerce' within the meaning of the Clayton Act" (353 U.S. at 594-94). As the *duPont* case illustrates, the point is that the phrase—"in any line of commerce"—was in-

tended to sharpen the thrust of the Clayton Act by making its specific provisions apply to any separate and distinguishable segment within the same industry.

As both lower courts also noted (Pet., App. A., p. 11a; App. C., p. 45a), it is wholly beside the point to argue that the subject contract stimulated competition with oil in the Florida Peninsula by introducing coal as fuel. In the trial court's words:

> "Inquiries of this kind were expressly rejected as irrelevant in Standard Oil Company of California, et al. v. United States, 337 U.S. 293."[8]

There is no room to quarrel here with this Court's rejection of such considerations as irrelevant. In fact, the introduction of coal as a competitor to oil in Florida would follow from the use of coal—not from the twenty-year exclusionary contract. As petitioner itself subsequently proved,[9] it could easily obtain adequate coal supplies from any of 700 coal producers, without resort to an illegally preemptive commitment.

In principle, Section 3 does not tolerate the stimulation of competition with oil at the sacrifice of the competitive opportunities of hundreds of other qualified coal vendors, for an irreducible twenty-year period, to supply the needs of a coal market greater than the entire balance of the state. The resultant vice of the contract, within the meaning of Section 3, is precisely the

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[8] Among the conceivable economic justifications rejected in that case was the utility of a requirements contract to a "newcomer," seeking to enter a market dominated by "entrenched competitors" (337 U.S. at 307).

[9] Petitioner contracted with the Love & Amos Coal Company on a year-to-year basis (p. 5, *supra*).

same as that condemned, as follows, in *International Salt, supra* (332 U.S. at 398):

> "If others cannot produce salt equal to reasonable specifications for machine use, it is one thing; but it is admitted that, at times, at least, competitors do offer such a product. *They are, however, shut out of the market by a provision that limits it, not in terms of quality, but in terms of a particular vendor.*" (Emphasis supplied.)

Similarly, the hypothetical possibility that petitioner might some day construct a generating unit using coal which would not be covered by the contract is of no avail. If this were a defense, little would be left of Section 3. Its prohibitions could always be avoided by the simple device of limiting requirements contracts to the buyer's existing plants and the process could easily be repeated as new ones were built. The controlling factors are that petitioner's total coal requirements, in huge amounts, for all present and actually projected facilities are committed to a single seller for twenty years, and that hundreds of qualified competitors are excluded from the market.

Indeed, even if it were true—which it is not—that petitioner was in the market for coal for other units, the present contract would violate Section 3 because of the huge market thereby reserved to a single buyer and the extended period of the reservation. If, for example, General Motors entered into a twenty-year contract to buy from a single supplier all of the steel or electrical equipment needed by its Chevrolet Division, that contract would undoubtedly be within the scope of Section 3, although General Motors would be free to deal elsewhere for the similar requirements of its other divisions.

The decided cases so teach. Thus, the salt contracts outlawed in *International Salt, supra*, covered only the seller's particular machines. It was deemed irrelevant that the buyer was free to acquire and use competing equipment, in which other salt could be used. See *United States* v. *International Salt*, 6 F.R.D. 302, 307 (S.D.N.Y. 1946), *aff'd.*, 332 U.S. 392 (1947); *Standard Oil Co. of California* v. *United States, supra*, 337 U.S. at 305; *Northern Pacific Railway Co* v. *United States*, 356 U.S. 1, 10, n. 8 (1958).[10] In two other Section 3 cases, appellate courts have condemned similarly limited preclusive agreements, although the buyers were at liberty to procure, and were in fact using, competitive equipment and materials. *Signode Steel Strapping Co.* v. *Federal Trade Commission*, 132 F. 2d 48, 52 (4th Cir. 1942); *Judson L. Thomson Mfg. Co.* v. *Federal Trade Commission*, 150 F. 2d 952 (1st Cir. 1945), *cert. denied*, 326 U.S. 776 (1945).

No such elements are in fact present in this case, and, as the lower courts held, it must be decided on the basis of reality, not conjecture. The reality is that the present contract confines to a single seller all, and not part, of petitioner's coal requirements for twenty years. It is beyond question, we submit, that such a contract is prohibited by Section 3.[11]

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[10] In this connection *Northern Pacific* said (356 U.S. at 10, n. 8):

> "As a matter of fact the defendant in International Salt offered to prove that competitive salt machines were readily available which were satisfactory substitutes for its machines (a fact the Government did not controvert), but the Court regarded such proof as irrelevant."

[11] It is of no moment that the prohibited preemption is accomplished by a single contract. The statute is worded in the singular.

(3) *The applicability of Section 3 does not depend upon whether the seller is "dominant".* Petitioner also argues that Section 3 applies only to situations where a "dominant" seller imposes upon the buyer the condition that the buyer shall not "use or deal in" the goods of competitors (Pet. 15-18).

This argument has no basis in the statutory language, and this Court has expressly ruled to the contrary. In *Standard Oil Co. of California, supra*, the Court expressly recognized that the seller did not have a "dominant position" in the market, but it nevertheless applied Section 3. 337 U.S. at 302, 309. In *Times-Picayune Publishing Co.* v. *United States* (a Sherman Act case), *supra*, 345 U.S. at 608-609, the Court reiterated the point, stating that the precise prohibition of

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It is satisfied when "*a*" contract produces the forbidden competitive result. As the Court below aptly said (Pet., App. A, p. 6a):

> "A single contract of sale of sufficient magnitude, with performance extending over an extended period of time, can cause this result."

A single contract sufficed to bring Section 3 into play in *Pennsylvania Water & Power Co.* v. *Consolidated Gas, Electric Light & Power Co.*, 184 F. 2d 552, 559 (4th Cir. 1950), *cert. denied*, 340 U.S. 906 (1950). Similarly, Section 1 of the Sherman Act is frequently applied to a single contract. See, e.g., *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U.S. 173 (1942); *Norfolk Southern Bus Corp.* v. *Virginia Dare Transportation Co.*, 159 F. 2d 306 (4th Cir. 1947), *cert. denied*, 331 U.S. 827 (1947); *National Transformer Corp.* v. *France Mfg. Co.*, 215 F. 2d 343, 361-62 (6th Cir. 1954); *McCullough* v. *Kammerer Corp.*, 166 F. 2d 759 (9th Cir. 1948), *cert. denied*, 335 U.S. 813 (1948).

If a single contract is reached by the Sherman Act, it is necessarily covered by Section 3, which "was directed to prohibiting specific practices even though not covered by the broad terms of the Sherman Act" (*Standard Oil Co. of California, supra*, 337 U.S. at 297).

Section 3 is violated either "[w]hen the seller enjoys a monopolistic position in the market for the 'tying' product, *or* if a substantial volume of commerce in the 'tied' product is restrained" (emphasis in original).[12]

The test, of course, is to be found in the language of Section 3. The statute outlaws the making of "a" contract which excludes competition where the effect of the contract "may be to substantially lessen competition or tend to create a monopoly in any line of commerce". There is no qualification based on the respective economic strength of the contracting parties. As this Court noted in *Standard Oil Co. of California, supra*, it was established by *International Salt, supra*, that the application of the particularized prohibition of Section 3 follows "once it has been established that 'the volume of business affected' is not 'insignificant or insubstantial' and that the effect of the contracts is to 'foreclose competitors from [a] substantial market' " (337 U.S. at 304).[13]

Petitioner's effort, by reference to a variety of miscellaneous legislative materials, to narrow the scope of Section 3 to situations in which the seller has overpowered the buyer, and the buyer complains, is of no avail. As long ago as *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U.S. 346, 356 (1922), this Court ruled that, in determining whether a contract comes within Section 3, "the words of the act are plain, and their meaning is apparent without the necessity of

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[12] Cf. *Northern Pacific Railway Co.* v. *United States, supra*, 356 U.S. at 11.

[13] There is, of course, no issue in the present case under Section 3 as to whether a requirements contract is *per se* unlawful. See p. 10, n. 7, *supra*.

resorting to the extraneous statements and often unsatisfactory aid of such reports."

No amount of legislative discussion—even if petitioner's characterization of it were correct—can restrict Section 3 to situations involving numerous contracts dealing with " 'the distribution of goods' " (Pet. 16). The Section specifically applies to "*a* contract . . . for use, *consumption* or resale" (emphasis supplied).

Nor can Section 3 be sensibly limited solely to restraints imposed by a seller. For example, if General Motors were to contract to buy its entire twenty-year requirements of automobile radios from a single radio manufacturer, there is no doubt that Section 3 would be called into play, even if the contract were imposed by the buyer. The suppressive effect on competition would be the same as that of a twenty-year requirements contract imposed by United States Steel on a smaller automobile manufacturer—e.g., Studebaker-Packard. In both instances, a large amount of commerce would be removed from the competitive market for the period of the contract. In either case "observance by [the buyer] of his requirements contract with [the seller] does effectively foreclose whatever opportunity there might be for competing suppliers to attract his patronage" (*Standard Oil Co. of California, supra*, 337 U.S. at 314).

The economic desirability or undesirability of an arrangement prohibited by Section 3 is equally irrelevant to the issue. This Court has emphasized that Congress, by enacting Section 3, has foreclosed judicial inquiry into the economic desirability of requirements contracts. The opinion in *Standard of California* carefully reviewed the possible economic justifications for

requirements contracts, including those now pressed by petitioner (337 U.S. at 306-308). But it was concluded that such considerations are immaterial in respect of preemptive contracts covered by Section 3. The Court held (337 U.S. at 311):

> "Congress has authoritatively determined that those practices are detrimental where their effect may be to lessen competition. *It has not left at large for determination in each case the ultimate demands of the 'public interest'*, as the English lawmakers, considering and finding inapplicable to their own situation our experience with the specific prohibition of trade practices legislatively determined to be undesirable, have recently chosen to do." (Emphasis supplied.)

Petitioner concedes that the natural gas cases—the only cases in which contracts for a term comparable to that in the present case have been upheld—are not in point because "no question of a violation of Section 3 was raised and . . . each dealt with a regulated 'natural monopoly'" (Pet. 23). They are, in fact, cases in which the regulated economy of the natural gas industry and the primary responsibility of the Federal Power Commission with respect to rate-making were the determining factors. They involve situations in which regulation has been substituted for competition as the national policy. The governing policy of the Congress is non-competitive in those cases, in sharp distinction to situations governed by Section 3.

(4) *The courts below properly refused to grant judgment enforcing the unlawful contract.* Petitioner argues that the illegality of a contract under Section 3 is not available to the seller as a defense. It apparently contends that only the *buyer* could invoke the illegality of the contract. This is obviously unfounded.

If so, the contract would be void for lack of mutuality. Cf. *Jarrett* v. *Pittsburgh Plate Glass Co.*, 131 F. 2d 674, 676 (5th Cir. 1942). Practically, the result would be that the petitioner, at any time during the twenty years, could denounce the contract and escape its obligations for the unexecuted portion of the contract, but the respondents would have no corresponding right of recourse. Petitioner's legal argument is that since the statute declares unlawful "a sale or contract of sale", it condemns only the seller's "act", and not the contract. This is merely a play on words. The contract was negotiated and entered into in violation of law, and is illegal. It is not legal as to the buyer and illegal as to the seller.[14]

Nor can the seller be procedurally estopped from invoking the illegality of the contract as a defense. This question, too, has recently been settled by this Court in *Kelly* v. *Kosuga*, 358 U.S. 516, 520 (1959), which, strangely, petitioner does not discuss, although that decision was relied on by the court below (Pet. App. A., 12a). In *Kelly* v. *Kosuga*, *supra*, the seller sued for the price of onions which had been delivered to the buyer. The defense was that the purchase was part of an agreement in violation of the Sherman Act. The Court rejected the defense because the defendant had received

[14] There are numerous cases in which the defense of illegality has been asserted and established by the party against whom a statutory prohibition is in terms addressed. See, e.g., *Gibbs* v. *Consolidated Gas Co. of Baltimore City*, 130 U.S. 396 (1889); *Weil* v. *Neary*, 278 U.S. 160 (1929); *Detroit-Kentucky Coal Co.* v. *Bickett Coal & Coke Co.*, 251 Fed. 542, 546-47 (6th Cir. 1918); *E. E. Taenzer & Co.* v. *Chicago, R. I. & P. Ry. Co.*, 191 Fed. 543 (6th Cir. 1911); *LeJohn Manufacturing Co.* v. *Dwight Webb, Jr.*, 222 F. 2d 48 (D.C. Cir. 1955); *Weitzel* v. *Brown-Neil Corp.*, 152 F. Supp. 540, 545 *et seq.* (N.D. W.Va. 1947), *aff'd.*, 251 F. 2d 661 (4th Cir. 1958).

the onions, the sale of the onions was a separable transaction, and the Court would not be enforcing the unlawful agreement itself by allowing the seller to recover for the delivered merchandise at a fair price. The Court, however, reiterated the fundamental principle that it will not enforce a contract violative of the antitrust laws where "the judgment of the Court would itself be enforcing the precise conduct made unlawful by the Act." [15]

Yet this is exactly the result that petitioner here seeks and relief must therefore be denied (p. 1, *supra*). As the Court below stated (Pet., App. A, p. 13a):

> "The contract in the present case is an executory one. It is not at the present time divisible into an executed portion and an executory portion so as to permit recovery for any portion which may have been performed without ordering a violation of the Act in the future. The appellant is seeking to have declared valid the very provisions which make it invalid. To do so would be to compel the parties to engage in business with each other over a period of twenty years in a manner which the Act declares invalid."

It is also impossible to reconcile petitioner's claims with the Congressional determination of public policy embodied in Section 3. Section 3 expressly compre-

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[15] As the Court long ago held in *McMullen* v. *Hoffman*, 174 U.S. 639, 654 (1899):

> "The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract. In case any action is brought in which it is necessary to prove the illegal contract in order to maintain the action, the courts will not enforce it, nor will they enforce any alleged rights directly springing from such contract."

hends the seller's competitors among its beneficiaries.[16] Their interests are completely ignored by the premise, implicit in petitioner's argument, that the buyer's insistence on performance estops a seller, even before deliveries commence, from disavowing a contract violative of Section 3. Such an estoppel would be incompatible with the public policy of the antitrust laws. *Sola Electric Co.* v. *Jefferson Electric Co., supra*, 317 U.S. at 177; *W. R. Grace & Co.* v. *Civil Aeronautics Board*, 154 F. 2d 271, 283 (2d Cir. 1946), *cert. dismissed*, 332 U.S. 827 (1947). Nor can debates about good or bad faith affect the result.[17] "The interest in private good faith is not a universal touchstone which can be made the means of sacrificing a public interest secured by an appropriate exercise of the legislative power" (*Scott Paper Co.* v. *Marcalus Mfg. Co.*, 326 U.S. 249, 257 (1945)).[18]

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[16] See, e.g., *Oxford Varnish Corp.* v. *Ault & Wiborg Corp.*, 83 F. 2d 764, 765 (6th Cir. 1936), where the performance of a contract violative of Section 3 was enjoined upon suit by a competitor of the seller.

[17] In fact, respondents here were not the original contracting sellers (Pet. 5; R. 6a).

[18] No antitrust citations support the passage from *Corbin on Contracts* recited in *Calligan* (Pet. 28-29). The reason is apparent from Professor Corbin's previous comments concerning the impact of the Sherman and Clayton Acts on contracts within their coverage. He states in this regard (6 *Corbin on Contracts* § 1399, at p. 553):

> "Any agreement that is within the provisions of either Act is necessarily an unenforceable agreement."

And he adds with specific reference to Section 3 (*id.* at p. 554):

> "Any contract for exclusive dealing is a deprivation of opportunity to competitors. Such a contract is illegal if it is shown that the deprivation effected by it 'may be' 'substantial' in amount."

(5) *There is no conflict of circuits.* The court below properly rejected petitioner's claim that affirmance of the trial court would produce a conflict with the decision of the Court of Appeals for the Seventh Circuit in *Beloit Culligan Soft Water Service, Inc.* v. *Culligan*, 274 F. 2d 29, decided December 15, 1959 (Pet., App. A, p. 13a). Contrary to petitioner's contention, *Culligan* is wholly consistent with the decision below. It nicely illustrates the correct application of *Kelly* v. *Kosuga, supra.*[19] *Culligan* enforced a franchise agreement *which had been performed* by the licensees, *and only "after* the excision of the requirements provision" (274 F. 2d at 34, emphasis supplied). The opinion expressly recognizes the seller's right to resist the enforcement of a contract which violates Section 3. The opinion correctly states (*Ibid.*):

> "We interpret the current view of the Supreme Court to be that a defense based on violation of Section 3 of the Clayton Act is valid if the contract at issue is intrinsically illegal; that is—if the Court, by its judgment, would be enforcing the specific conduct prohibited by the Act."

The *Culligan* Court accordingly emphasized that the buyers there—unlike petitioner—were not asking the Court to enforce an unlawful contract. The Court was able to enforce the contract—"after excision of the requirements provision"—because the seller had previously agreed to a provision of a Federal Trade Commission consent order which deleted the exclusionary

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[19] See also *Bromberg* v. *Moul*, 275 F. 2d 574 (2d Cir. 1960), in which *Kelly* v. *Kosuga* was also correctly applied to dismiss an action for damages based on a contract effected at prices in excess of the ceilings established by the Office of Price Stabilization.

provisions of its agreements. 274 F. 2d at 31-32. This deletion was possible under the *Culligan* contracts because each contained severability clauses preserving the balance of the contract in the event that any provision should be declared illegal (*Ibid.*).[29]

(6) *The contract at bar is invalidated by Sections 1 and 2 of the Sherman Act.* Although the lower courts did not reach the Sherman Act questions, they may be considered here. *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 214 (1951). The undisputed facts clearly establish that the contract is violative of the Sherman Act, as well as the Clayton Act.

First, its twenty-year term is indefensible by Sherman Act standards. See *United States* v. *Pullman Co.*, *supra*, 50 F. Supp. at 129; *United States* v. *American Can Co.*, *supra*, 87 F. Supp. at 31. Next, considering the substantial size of the market preempted, and the undisputed evidence of the suppression of the opportunities of hundreds of willing competitors of the seller (pp. 4-5, *supra*), the contract embodies an unreasonable restraint within the meaning of the Sherman Act. Thus, in *International Salt*, *supra*, the Court held as follows that the Sherman Act, as well as Section 3 of the Clayton Act had been violated (332 U.S. at 396):

> "Not only is price-fixing unreasonable, *per se*, United States v. Socony-Vacuum Oil Co., 310 U.S. 150; United States v. Trenton Potteries Co., 273 U.S. 392, but also it is unreasonable, *per se*, to foreclose competitors from any substantial market. Fashion Originators Guild v. Federal Trade Commission, 114 F. 2d 80; affirmed, 312 U.S. 457."

[29] The present contract contains no severability clause.

Further, the monopoly which the contract created is prohibited by Section 2 of the Sherman Act. See, e.g., *Indiana Farmer's Guide Publishing Co. v. Prairie Farmer Publishing Co., supra*, 293 U.S. at 279; *United States v. Yellow Cab Co., supra*, 332 U.S. at 225-27; *William Goldman Theatres, Inc. v. Loew's, Inc.*, 150 F. 2d 738, 744 (3d Cir. 1945), *cert. denied*, 334 U.S. 811 (1948). To quote the *Goldman* case (150 F. 2d at 744):

> "We know of no authority which sanctions what would otherwise be an illegal monopoly simply because it operates in a single city or a particular part of a city and affects only a part of an industry involved. There is no such limitation on the effect of the antitrust laws."

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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June 11, 1960

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. ~~92~~ 87

TAMPA ELECTRIC COMPANY,

Petitioner,

v.

NASHVILLE COAL COMPANY, NASHVILLE COAL, INC. and WEST KENTUCKY COAL COMPANY,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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June 16, 1960

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 931

TAMPA ELECTRIC COMPANY,

Petitioner,

v.

NASHVILLE COAL COMPANY, NASHVILLE COAL, INC. AND WEST KENTUCKY COAL COMPANY,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

At page 15 of their brief in opposition, respondents argue that "the applicability of Section 3 does not depend upon whether the seller is 'dominant'", citing this Court's statement in *Standard Oil Co. of California* v. *United States*, 337 U. S. 293 (1949), that in that case the seller did not have a "dominant position" in the market (337 U. S. at 302).

We submit that respondents are seeking to apply the quotation from this Court's opinion in *Standard Oil* out of context. As we read the opinion, the reference to Standard's lack of market dominance was made only in relation to the Court's consideration of the qualifying clause of Section 3. Prior to that case, it had frequently

been suggested that the test of whether or not particular exclusive dealing or tying contracts might "substantially lessen competition or tend to create a monopoly" depended upon the "domination of the market" by the seller (337 U. S. at 301). In *Standard Oil* this Court concluded that even though "we may assume • • • that Standard does not by itself dominate the market" (337 U. S. at 309), the proportion of sales in that market controlled by it and its leading competitors through requirements contracts was such as to bring the case within the qualifying clause of Section 3.

All of this has nothing to do with our contention that a contract cannot violate Section 3 when concededly the seller had no such economic leverage as to enable it to impose an exclusive dealing condition on the buyer. On that issue, it is plain from Mr. Justice Frankfurter's dissenting opinion in *Federal Trade Commission* v. *Motion Picture Advertising Service Co.*, 344 U. S. 392, 402 (1953), that *Standard Oil* supports, rather than refutes, our contention:

> "The obvious bargaining power of the seller [in *Standard Oil*] *vis-à-vis* the retailer does not, so far as we are advised, have a parallel here. • • • In any event, in the *Standard Oil* case we recognized the discrepancy in bargaining power • • •."

Respondents repeatedly complain that in our petition we neglected to comment on the recent decision of this Court in *Kelly* v. *Kosuga*, 358 U. S. 516 (1959). We are happy to repair the omission. In our judgment, that decision squarely supports our contention that a statute such as Section 3 does not invalidate a contract as against a buyer, even though the seller may have violated the section

by entering into it. We suggest also that the present case well illustrates the statement of this Court that:

> "• • • If the defense of illegality is to be allowed as a collateral method of enforcement of the anti-trust laws, as the breadth of the petitioner's [respondents'] argument suggests, it must be said that his theory creates a very strange class of private attorneys general" (358 U. S. at 520).

Respectfully submitted,

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June 16, 1960

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 87

TAMPA ELECTRIC COMPANY,
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v.

NASHVILLE COAL COMPANY, NASHVILLE COAL, INC. and WEST KENTUCKY COAL COMPANY,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER TAMPA ELECTRIC COMPANY

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 87

TAMPA ELECTRIC COMPANY,
Petitioner,

v.

NASHVILLE COAL COMPANY, NASHVILLE COAL, INC. and WEST KENTUCKY COAL COMPANY,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER TAMPA ELECTRIC COMPANY

Opinions Below

The majority and dissenting opinions of the United States Court of Appeals for the Sixth Circuit (R. 64-92), rendered on April 4, 1960, are officially reported at 276 F. 2d 766. The opinion of the United States District Court for the Middle District of Tennessee, Nashville Division (R. 44-56), rendered on November 18, 1958, is officially reported at 168 F. Supp. 456.

Jurisdiction

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on April 4, 1960. The

Petition for a Writ of Certiorari was filed on May 12, 1960, and was granted on June 27, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1) and 2101(c).

Statute Involved

Section 3 of the Clayton Act; 15 U.S.C. § 14:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce." Oct. 15, 1914, c. 323, § 3, 38 Stat. 731.

Questions Presented

1. Does a contract with a coal producer to furnish a defined and limited portion of the fuel requirements of a single plant of a single electric utility for a period of 20 years, which was economically necessary to and desired by both contracting parties at the time it was entered into, which embraced less than 1% of the coal marketed by the seller and its competitors, and which provided for the introduction of a new kind of fuel into a state monop-

olized by oil, come within the prohibition of Section 3 of the Clayton Act?

2. In any event, can a seller be heard to contend that it violated Section 3 of the Clayton Act in justification of its own repudiation of a contract which the purchaser wishes to enforce?

Statement of the Case

Facts

Since there is no dispute as to the facts, and they are clearly and succinctly set forth in the majority opinion below, we believe it would be a convenience to the Court if we adopt that statement as our own:

> "Appellant [petitioner] is an electric public utility serving the city of Tampa, Florida, and neighboring communities (R. 30).[1] The appellees [respondents] are engaged in mining and selling coal (R. 5, 19).
>
> "In 1954 appellant operated two integrated generating plants, both located on Tampa Bay, Florida, at which there were eleven generating units, all of which burned oil (R. 30). In that year, in order to meet the increasing demand for electric energy in its service area, appellant decided to expand its facilities and build a new and additional integrated generating station on Tampa Bay, to be known as the Francis J. Gannon Station, at which it was planned to ultimately install six generating units (R. 30).
>
> "The May 23, 1955, contract [the contract at bar] was for the purchase of coal for use at the Gannon Station. It was entered into between the appellant as the buyer and the Potter Towing Company, a Tennessee partnership of David K. Wilson and

1. All record references have been added by us to the Court's statement.

Justin Potter, as the seller (R. 7-13). Subsequent to the making of the contract, the interest of Wilson and Potter was transferred to the appellee Nashville Coal Co. and thereafter to the appellee Nashville Coal, Inc., which is a wholly owned subsidiary of the appellee West Kentucky Coal Company (R. 5). The West Kentucky Coal Company guaranteed the appellant in writing against any loss or damage arising out of nonperformance of the contract (R. 6, 14).

"The contract, after stating that the seller proposed to make available for sale to the buyer large quantities of coal from the West Kentucky field near Uniontown, Kentucky, and that the buyer desired to purchase certain coal for its use in its plant to be constructed near Tampa, upon the terms and conditions thereinafter set out (R. 7), provided as follows:

"'Seller agrees to provide and deliver on the dock or docks of the Buyer at Plant Gannon coal to supply the total requirements of fuel of the Buyer for the operation of its first two units to be installed at the Gannon Station and the Buyer agrees to accept and pay for such fuel as provided in Article 4 hereof, which fuel requirements shall not be less than 225,000 tons of coal per unit per year. It is further agreed that if during the first ten years of the term of this contract the Buyer constructs additional units in which coal is used as the fuel, it shall give the Seller notice thereof two years prior to the completion of such unit or units and upon completion of same the fuel requirements thereof shall be added to this contract and be furnished by the Seller and accepted by the Buyer. It is understood that the Buyer has the option to be exercised two years prior to completion of said unit or units of determining whether coal or some other fuel shall be used in same. It is anticipated that deliveries will start approximately

March, 1957 for the requirements of the first unit and that deliveries for the requirements of Unit #2 will begin when constructed' (R. 7-8).

It also provided,

"'The term of this agreement shall be for a period of twenty years from the first day of the month in which month first deliveries are made to the Buyer' (R. 12).

"The first unit of the Gannon plant commenced operation August 1, 1957; the second unit on October 29, 1958. The third unit, a coal burning unit, was under construction at the time this action was filed (R. 31).

"For the appellant to equip the Gannon Station to burn coal necessitated a capital expenditure of $3,000,000.00 more than if the fuel initially chosen had been oil (R. 32). To supply the appellant under this contract required a capital expenditure in excess of $7,500,000.00 by the appellees (R. 32).

"In April, 1957, just before the first coal was to be delivered under the contract, the appellees advised appellant that they would not perform under the contract, which they contended was illegal and unenforceable by either party (R. 20, 32). As a result, it has been necessary for appellant to purchase its coal requirements in the market at a price substantially higher than that provided for in the contract (R. 9-10, 27, 35).

"In making such arrangements it estimated that its coal requirements for its Gannon Station were approximately as follows:

Year 1958	350,000 tons
Year 1959	700,000 tons
Year 1960	700,000 tons
Year 1961	1,000,000 tons

'To increase as required to about 2,250,000 tons per year' (R. 27).

> "At the time the contract was entered into, coal accounted for less than 6% of the fuel consumed in the entire state of Florida. Every electric generating installation in peninsular Florida burned oil at that time (R. 30, 31). It was estimated by the buyer that within a very few years the Gannon Station would consume more coal than was presently consumed in the entire state of Florida (R. 27). Peninsular Florida's coal consumption was approximately 700,000 tons per year." (Reprinted from R. 65-67.)

Two further facts should be noted. First, it was conceded by respondents in the Courts below that Potter Towing Company, the original contractor, was but one of some 700 coal producers who were not only able but "eager" to sell coal to petitioner, and had no such economic leverage vis-a-vis petitioner as to enable it to insist upon the "requirements" provision against petitioner's wishes (R. 43). That provision was instead motivated by the legitimate business needs of both the contracting parties, who together spent over $10,000,000 in preparation for the performance of the contract (R. 32).

Secondly, it should be pointed out that after the first unit at Gannon Station went into operation and during the pendency of this lawsuit, Peabody Coal Company, one of respondents' leading competitors, offered to supply coal for use in two units of petitioner's oil burning plants if petitioner would convert them to the use of coal, and that as a result of this offer petitioner's oil supplier reduced its price (R. 31, 33, 42).

The Lawsuit

Petitioner, on September 3, 1957, commenced an action in the United States District Court for the Middle District

of Tennessee, Nashville Division, for a declaratory judgment that the contract of May 23, 1955 was valid and enforceable (R. 4). In their answer respondents admitted the execution of the contract and the repudiation of their obligations thereunder, but alleged that the contract was void and unenforceable on the ground that it violated Section 3 of the Clayton Act and Sections 1 and 2 of the Sherman Act (R. 19). Respondents then filed a motion for summary judgment (R. 23), and petitioner filed a cross-motion seeking the same relief (R. 28). District Judge William E. Miller granted respondents' motion for summary judgment, and denied petitioner's cross-motion, on the ground that the material facts were not in dispute and established the illegality of the contract under Section 3 of the Clayton Act (R. 44). The Court thereupon entered judgment declaring the contract illegal, void and unenforceable (R. 56). Petitioner appealed to the United States Court of Appeals for the Sixth Circuit (R. 59).

Decision Below

The majority of the Court below sustained the District Court, holding that the contract violated Section 3 of the Act and was therefore unlawful and unenforceable by either the buyer or the seller. As we read the opinion, the Court based its decision solely on the facts that the contract used the word "requirements" and that the quantity of coal involved in the contract would soon exceed the total amount of coal presently being sold in the state of Florida, and amounted in dollar value, over the life of the contract, to over $128,000,000. Accordingly, citing this Court's decision in *Standard Oil Co. of California* v. *United States*, 337 U. S. 293 (1949) (*"Standard Oil"*), the Court held that the amount involved in the contract

was "not insignificant or insubstantial" and that the contract was therefore void (R. 72).

The Court dismissed the contention that it was plain from the legislative history of the Act that it was intended to apply only to practices whereby powerful sellers imposed exclusive dealing or "tying" conditions upon a substantial number of buyers for the purpose and with the effect of pre-empting a substantial portion of the market for the goods which they sold, on the ground that the Act in unambiguous terms referred to "a" contract of sale for "use, consumption or resale" and that this Court had held in *Standard Oil* that the Act was "applicable to a situation where the seller did not occupy a dominant economic position in the industry" (R. 68, 69).

Again citing *Standard Oil*, the Court held that it was immaterial that the contract contained no condition that the purchaser would not deal in the goods of the seller's competitors, since the contract did require the seller to supply the buyer's "'total requirements' for the first two coal burning units and for such other units at the Gannon Station as would be constructed as coal burning units" (R. 69). The Court dismissed as immaterial the fact that under the contract the purchaser could, and in fact did, purchase oil, concededly a "competitive" fuel, on the ground that oil and coal are "separate defined subdivision[s] of the fuel industry generally" (R. 71). Similarly, the Court disregarded the allegedly "remote" possibility that the buyer might convert some of its oil burning units and purchase coal for these units from the seller's competitors, since "there is nothing to indicate that there is any planned or probable conversion" (R. 71). Finally, citing this Court's opinion in *Kelly* v. *Kosuga*, 358 U. S. 516 (1959), the Court held that since

the contract was void, the Court "will not assist either party in its enforcement" (R. 74).

In his carefully reasoned, and, we submit, completely sound dissent, Judge Weick took issue with the majority on each and every point (R. 74-92).

Summary of Argument

In several respects the Court below erroneously applied Section 3 to a family of contracts which the Act has never been held to govern in the 45 years since its enactment.

The Court's initial error was to rule that Section 3 invalidated a contract for the sale of a limited and defined portion of a buyer's total requirements of a product. The Act does not make "requirements" contracts as such illegal. A contract falls within the statutory language only if it can be said to contain a condition, agreement or understanding that the buyer will not use the goods of the seller's competitors. The contract at bar contains no such condition, agreement or understanding; there is not a word suggesting that petitioner may not deal in competing goods. Moreover, since the contract covers only the coal required by the first two units of Gannon Station and such of the remaining four units as petitioner elects to construct as coal burning during the first half of the contract term, petitioner is free to burn coal purchased from respondents' competitors in any unit thereafter constructed at that station. Even as to units at Gannon Station supplied by respondents themselves, petitioner may, under the contract, elect to purchase 15% of the required fuel from other designated sources. Petitioner is also free to burn coal purchased from respondents' competitors in any of the eleven units of its two other integrated power-producing plants, presently oil burning, which it may

elect to convert to coal, as well as in any new plant which it may determine to construct. Finally, oil, concededly a competitive fuel with coal, is presently being used at petitioner's two other plants and, under the terms of the contract, may even be burned in four of the six units at Gannon Station itself. Thus as petitioner can deal and is dealing in the goods of respondents' competitors, the contract cannot be deemed based on the condition, agreement or understanding that it will not do so.

The Court compounded this error by refusing to consider the statutory history of Section 3, which conclusively demonstrates that the Act was not intended to outlaw a single contract for the supply of part of a consumer's requirements, negotiated at arm's length with a seller who concededly lacked the economic leverage necessary to impose any exclusive dealing condition on the buyer. In terms of the language of Section 3 itself, such a contract cannot be deemed based "on the condition" that the buyer "shall not" use the goods of the seller's competitors, nor does a contract with a single consumer such as petitioner "substantially lessen competition" in a market, which was the concern of Congress in enacting the statute.

The result reached by the Court below is inconsistent with the holding of every previous case applying Section 3, since no court has ever invalidated contracts under this statute except where they exemplified the very elements which Congress had regarded as objectionable when it adopted the Act, namely, economic leverage by the seller coupled with a practice of tying up a substantial segment of the market for the seller's goods.

Not only do the language and legislative history of Section 3, as well as the relevant case law, militate against the conclusion of the Court below, but also the decision flouts economic realities. Coal, the subject matter of the contract at bar, is one of the most competitive products

in the country, and petitioner is only one of the innumerable users, actual and potential, which constitute the market available to respondents and their competitors. Indeed, as is conceded by respondents, there are 700 coal producers ready, willing and able to sell to petitioner, and the maximum amount of coal covered by the contract at bar represents less than 1% of the coal marketed by these producers. In terms of the market for all competitive fuels, the portion served by this contract becomes even more insignificant. The Court below ignored these facts because it refused to define the relevant market, even though this Court has held that whether or not a substantial lessening of competition occurs can only be judged in the framework of such a market.

In addition, the undisputed facts establish that the contract at bar effectively created competition by introducing into Florida a fuel to compete with oil, which had long enjoyed a virtual monopoly of the fuel business of that State. Indeed, as a result of the initial use of coal by petitioner, its oil supplier, previously unchallenged, has been compelled to reduce its price to meet actual offers by one of respondents' competitors to supply coal to petitioner. To hold, as did the Court below, that the contract at bar substantially lessened competition under such circumstances is factually untenable.

The grave damage to the economic life of this country flowing from the decision below is readily apparent. The holding of the Court outlaws every contract for the supply of the requirements of a single consumer (or even the requirements of a single consumption unit of a single consumer), provided only that such requirements amount to a "substantial" volume of goods. As this Court has recognized in other contexts, such requirements contracts are frequently economic necessities where, as in the instant

case, large expenditures are made by the contracting parties on the basis of a commitment to supply the buyer's long-term needs for a commodity at a designated price. This is especially true in the case of public utilities such as petitioner, which are under an obligation to render continuous service to the public at rates fixed by governmental agencies, and thus have especial need for the assurance of a continuous supply of raw materials at a price governed by contract. There are probably thousands of contracts in existence similar to that at bar and there is no justification for invalidating them, since by their very nature they entail none of the evils which concerned Congress when it adopted Section 3.

Finally, as Section 3 was enacted for the protection of buyers as a class from coercive sellers, by its very terms is directed solely at the seller, and does not declare unlawful a contract containing an exclusive dealing condition, there is no basis for holding that a seller can invoke its own unlawful act under Section 3 as an excuse for avoiding its contractual obligations, where the buyer desires performance. To hold otherwise would not only be inconsistent with prior judicial interpretation of Section 3, but would ignore the doctrine firmly established by this Court that remedies not expressly authorized by Congress will not be judicially added to the antitrust laws.

ARGUMENT

I

Since the contract at bar covers only a limited and defined portion of the buyer's requirements and does not prohibit the buyer from dealing in the goods of the seller's competitors either in terms or in effect, it does not come within the purview of Section 3 of the Clayton Act at all.

As is clear on its face, and is conceded by the majority below, the contract at bar does not contain any "condition, agreement, or understanding" that the buyer will not use or deal in the goods of the seller's competitors. Yet such a condition is the gravamen of the Act. If the buyer is not prohibited by the contract from dealing in the goods of the seller's competitors, there can be no violation of Section 3.

The majority below contends, however, that the absence of such a condition is immaterial here, since the contract has the equivalent of such a condition in that it covers the buyer's " 'total requirements' for the first two coal burning units and for such other units at the Gannon Station as would be constructed as coal burning units" within the first ten years of the contract term (R. 69).

We submit that this proposition is manifestly untenable. For concededly the buyer is free at all times to buy coal, oil or any other fuel from the seller's competitors for use in any of the 11 presently oil burning units at the buyer's two other integrated stations on Tampa Bay, or in any new plant it may elect to construct. Furthermore, if the demands for additional electricity require the buyer to construct additional units at Gannon Station itself, the buyer is free to burn oil, gas or any other competitive

fuel in such units. It is only if the buyer determines to construct additional coal burning units at Gannon during the first half of the contract term that it is obligated to purchase its additional coal requirements from respondents. After this ten year period, the buyer is free to purchase coal from the seller's competitors even for use in any additional coal burning units constructed at Gannon. Moreover, the buyer may even purchase from other sources 15% of the requirements of the coal burning units at Gannon supplied by respondents, provided it uses some by-product as a fuel furnished by one of its local customers (R. 8).

The majority below sought to meet these incontrovertible facts first by asserting that there was no present plan for the conversion of any oil burning units to coal, and that therefore the exercise of petitioner's right to purchase coal from the seller's competitors for such units was so "remote" as to be "immaterial" (R. 71). The significance of this assertion escapes us. Since the buyer has the right to deal in the goods of the seller's competitors, the contract cannot be based upon the condition that it will not do so. It is irrelevant whether the buyer has any present plans to exercise that right.

But in any event, the record affirmatively discloses that since the commencement of this very litigation, Peabody Coal Company, one of respondents' coal producing competitors, offered to furnish coal for two of petitioner's oil burning units if petitioner would convert them to coal, and that such offer was seriously considered by petitioner (R. 31, 33-41, 42). The obvious reason why this offer was not accepted is that petitioner's oil supplier promptly reduced the price of oil so as to meet this threat of competition (R. 42). Thus, as Judge Weick pointed out in his dissent, "such possible conversion is not as remote

as was claimed" (R. 82). It is clear therefore that the contract, far from foreclosing the seller's competitors, engendered active competition among them for the buyer's trade.

Secondly, although conceding that "coal and oil are competitive fuels",[2] the Court below concluded that "for the purposes of Section 3 • • • each is to be treated as a separate, defined subdivision of the fuel industry generally" (R. 71). Accordingly, as the present contract deals only with coal, the Court held it was "irrelevant" that the buyer could purchase oil for its oil burning units (R. 71). We respectfully submit that this is a complete *non sequitur*. The fact that the contract covers only coal certainly does not show that it is based upon the condition that the buyer will not deal in the goods of the seller's competitors, when the buyer is concededly free to deal in competitive fuels. The buyer is engaged in producing electricity for resale to the public at three integrated plants situated on the periphery of Tampa Bay. Since it is free to burn oil, gas or coal in any of these integrated units, the contract clearly does not prevent it from dealing in the goods of the seller's competitors.[3]

Thus, the present contract is totally different from the requirements contracts held unlawful by this Court in

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2. Such a conclusion would seem compelled by this Court's holding in *West Ohio Gas Co.* v. *Public Utilities Commission*, 294 U. S. 63, 72 (1935), that "we take judicial notice of the fact that gas is in competition with other forms of fuel, such as oil and electricity."

3. In any event, as pointed out by Judge Weick (R. 83-87), it is plain from this Court's recent decisions, particularly *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U. S. 377 (1956) (the so-called "cellophane case") that where, as here, we are dealing with commodities "reasonably interchangeable" for use as boiler fuel, coal cannot "be treated as a separate, defined subdivision of the fuel industry generally."

Standard Oil, on which the majority below relies. There, the filling stations were required to purchase *all* their requirements of gasoline from the seller, however much their requirements might increase in the future. As this Court pointed out, "• • • the very existence of such contracts denies dealers opportunity to deal in the products of competing suppliers and excludes suppliers from access to the outlets controlled by those dealers" (337 U. S. at 298). Here, on the contrary, as the buyer's demands increase, the buyer is free at all times to determine whether to purchase additional coal under the contract or whether to purchase other fuels from the seller's competitors, and, of course, it can currently purchase coal (if that be the relevant "subdivision of the fuel industry") from the seller's competitors for use in any of its other integrated plants existing or built in the future.

Under these circumstances, we submit that the present contract more closely resembles a contract for a fixed quantity than the type of "requirements contract" held unlawful by this Court in *Standard Oil*. Indeed, we think this is apparent from a mere reading of the attempt of the majority below to meet this contention:

> "There is also an important difference between a 'requirements' contract and a contract which calls for the purchase of a definite quantity over a period of time which the buyer estimates to be sufficient to meet his requirements. As pointed out in *United States* v. *Standard Oil Co.*, 78 F. Supp. 850, 867, S. D. Cal., when a dealer agrees to take a specific amount of a product, there is a likelihood that he may, by reason of unexpected shortages or increased demands, use competitive products, and competitors thus will have the opportunity of putting their products into competitive use by the buyer, with the ultimate result of inducing the buyer to handle their products. Under a 'requirements' contract for a long period of time this chance is, for all

> practical purposes, cut off. As stated by the Supreme Court in *Standard Oil Co. of California* v. *United States*, supra, 337 U. S. 293, 314, 'It cannot be gainsaid that observance by a dealer of his requirements contract with Standard does effectively foreclose whatever opportunity there might be for competing suppliers to attract his patronage, • • •' " (R. 70).

Even though we should agree with this statement, we are in total disagreement with the Court's apparent view that it supports its thesis that the contract at bar is similar to the requirements contracts held unlawful in *Standard Oil*. On the contrary, it seems to us to prove exactly the opposite. For, as we have seen, the more the demands for electricity on petitioner increase, or the lower the price of coal compared to the price of oil, the freer petitioner is to purchase coal (or other fuels) from the seller's competitors. Thus this contract lacks the very element which made the requirements contracts in *Standard Oil* equivalent to straight exclusive dealing contracts.

In its opinion in the *Standard Oil* case, this Court expressly recognized the difference between a requirements contract applying only to a limited number of units, and one covering the purchaser's entire demands for a product. Thus the Court contrasted the facts in *Standard Oil* with those in *Federal Trade Commission* v. *Sinclair Refining Co.*, 261 U. S. 463 (1923), where it had held legal under Section 3 an arrangement whereby a number of refiners and wholesalers of gasoline leased tanks and pumps to retail dealers, on condition that the equipment be used only for dispensing gasoline supplied by the lessor:[4]

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4. This Court reasoned in *Sinclair* that "there is no covenant in the present contract which obligates the lessee not to sell the goods of another; and its language cannot be so construed. • • • The lessee is free to buy wherever he chooses; he may freely accept and use as many pumps as he wishes and may discontinue any or all of them" (261 U. S. at 474).

> "The present case differs of course [from the *Sinclair* case] in the fact that a dealer who has entered into a requirements contract with Standard cannot consistently with that contract sell the petroleum products of a competitor of Standard's no matter how many pumps he has * * *" (337 U. S. at 303-04).

This Court further noted:

> "* * * there is marked difference between a contract which confines an entire retail outlet to the use of a single brand and a contract which merely confines the use of a dispensing mechanism to a single brand: service-station sites, and therefore retail outlets, are limited in number; the number of pumps [or power plants] which a dealer may choose to set up is not * * *" (337 U. S. at 304, n. 6).

The purpose and effect of the "requirements" provision in the contract at bar is not to prevent the buyer from dealing with the seller's competitors, as it was in the contracts before the Court in *Standard Oil*. Its purpose and effect is simply to provide for the fact that it is impossible to predict in advance the precise amount of coal which a given unit will burn. For this depends both on the capacity of the unit and on the demand for its utilization. It may be noted that in the instant case the record affirmatively shows: (1) because of the demand for power in the area petitioner serves, the units already constructed at Gannon Station are in continuous operation, and (2) each of the units planned for Gannon Station has a known generating capacity, which requires a quantity of fuel ascertainable in advance to within approximately 5% (R. 31). On this basis the "requirements" of each unit of Gannon Station, as specified in the contract at bar, can easily be translated into an approximate number of tons, thus demonstrating that, for all practical pur-

poses, the contract is identical with a contract for a fixed amount (which concededly does not come within Section 3) rather than with a full requirements contract such as those involved in *Standard Oil*. To hold the contract illegal under Section 3 merely because the parties used the term "requirements" is to permit semantics to govern the application of the antitrust laws.

It is equally clear that illegality cannot be predicated upon the fact that the contract forecloses competitors of the seller from supplying Gannon Station with a reasonably ascertainable number of tons of coal over a period of years, even if that tonnage were deemed "substantial." Every contract for the purchase of goods, whether it be for the purchase of a dozen eggs or a billion tons of coal, excludes the seller's competitors from selling the same goods to the same purchaser. But there is nothing unlawful in that. As Mr. Justice Brandeis remarked in a leading antitrust case:

> "• • • the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence." *Board of Trade of Chicago* v. *United States*, 246 U. S. 231, 238 (1918).

We submit it is incontrovertible that the present contract is not a "contract for sale • • • on the condition, agreement, or understanding that the • • • purchaser thereof shall not use or deal in the goods • • • of a competitor or competitors of the • • • seller," and therefore does not contain the essential characteristic at which Section 3 is directed. Without such a "condition, agreement, or understanding," there can be no violation of the Act.

In our opinion this alone conclusively disposes of the instant case.

II

Even if the contract had contained an "exclusive dealing" condition, it would not have violated the Act, because a contract for the supply of the requirements of a single consumer, which was economically necessary for and desired by both buyer and seller, does not come within the purpose and intent of Section 3 as expressed either by Congress in enacting or by the courts in construing it.

As we have seen, the Court below concluded that the contract at bar in effect contained an exclusive dealing condition and therefore violated Section 3 simply because it covered a portion of the buyer's coal requirements which the Court considered to be "not insubstantial." The inevitable conclusion from that proposition is that any contract for the purchase of a substantial quantity of goods is illegal. We submit that the effect of such a decision is to apply Section 3 to a family of contracts never intended to be reached by Congress and that such a conclusion is not required by the language of the Act. Moreover, an examination of the relevant cases discloses that prior to the decision below, the courts have never before applied Section 3 to contracts which did not clearly come within the purpose and intent of that Section.

A

It is plain from the legislative history of the Clayton Act that Congress intended only to prohibit certain practices whereby powerful sellers sought to monopolize the market for their goods by compelling retailers and small manufacturers to agree not to use the goods of their competitors.

It seems to us that the conclusion of the majority below stems in large part from its assertion that the legislative history of Section 3 is immaterial (R. 68). This is a surprising statement in view of the fact that in *Standard Oil*—the most recent Section 3 decision of this Court—the relevant legislative history was discussed repeatedly, the Court quoting excerpts from the statements of individual members of Congress (337 U. S. at 297, n. 4; 307, n. 10; 312, text and n. 15). Moreover, the Court actually amended its opinion as originally rendered to correct an error which it had made in describing that history (see 338 U. S. at 808 (1949))[5]. Of course, in cases too numerous to cite, this Court has repeatedly emphasized the crucial role of legislative history in interpreting a statute.

As will be seen, even a cursory examination of the legislative history of Section 3 incontrovertibly confirms Judge Weick's conclusion, in his dissenting opinion below that it is "all too clear that what Congress was aiming at was monopolistic practices of powerful sellers in the

5. This Court also discussed the legislative history of Section 3 in a 1936 case, *International Business Machines Corp.* v. *United States*, 298 U. S. 131, 137-38 (1936). Similarly, the legislative history of the Section was consulted in *Beloit Culligan Soft Water Service, Inc.* v. *Culligan, Inc.*, 274 F. 2d 29, 35 (1959); *Dictograph Products, Inc.* v. *Federal Trade Commission*, 217 F. 2d 821, 827 (2d Cir. 1954), *cert. denied*, 349 U. S. 940 (1955); and *Judson L. Thomson Mfg. Co.* v. *Federal Trade Commission*, 150 F. 2d 952, 955 (1st Cir. 1945), *cert. denied*, 326 U. S. 776 (1945).

distribution of goods whereby the dealer or buyer was prohibited from dealing in the goods of the seller's competitors," and that "read in the light of its legislative history, the Clayton Act was never intended to vitiate a requirements contract made by a single public utility to ensure a continuing supply of boiler fuels at a constant price" (R. 77, 81).

Specifically, the practices condemned by Congress were based on the use of two types of contracts, commonly known as "tying" agreements and "exclusive dealing" agreements. A "tying" agreement is one where the seller, having control of a unique and desirable article, either through a patent or a powerful position in the market, refuses to sell or lease that article to a retailer or manufacturer unless the buyer agrees also to buy from the seller other articles which he may need in his trade, and which the seller can supply. In other words, the right to use the patented or controlled article is "tied" to the user's agreement to buy from the seller certain non-patented or uncontrolled articles. An "exclusive dealing" agreement is one whereby a seller exerting similar economic leverage exacts the purchaser's agreement, as a condition to the right to purchase the desired article, not to deal in any similar and competing articles that might be offered by the seller's competitors. In other words, Congress was concerned with attempts by powerful sellers to monopolize the market for the sale of their goods.

Thus, in its Analysis of the Bill, the House Report [H. R. Rep. No. 627, 63rd Cong., 2d Sess. (May 6, 1914)], which was incorporated into the Senate Report [S. Rep. No. 698, 63rd Cong., 2d Sess. (July 22, 1914)], considered

the effect of Section 3 of the Clayton Act and at length spoke of the evils sought to be condemned:[6]

> "* * * Let us therefore consider what this section really accomplishes. It prohibits the exclusive or 'tying' contract made between the manufacturer and the dealer by purchase or lease, whereby the latter agrees, as a condition of his contract, not to use or deal in the commodities of the competitor or rival of the seller or lessor. It is designed *merely* to prevent this unfair trade practice now so common throughout the country, and which is generally regarded by everyone who has given the subject any serious consideration as unjust to the local dealer and to the community and as monopolistic in its effects. * * *
>
> "* * * Where the concern making these contracts is already great and powerful, such as the United Shoe Machinery Co., the American Tobacco Co., and the General Film Co., the exclusive or 'tying' contract made with local dealers becomes one of the

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6. Section 3 as finally enacted was an amended version of Section 4 of the bill as originally passed by the House of Representatives, and, at that time, read as follows:

> "That any person engaged in commerce *who shall lease or make a sale of goods* * * * for use, consumption, or resale * * * on the condition or understanding that the lessee or purchaser thereof shall not use or deal in the goods * * * of a competitor or competitors of the lessor or seller *shall be deemed guilty of a misdemeanor,* and upon conviction thereof shall be punished by a fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both, in the discretion of the court." H.R. Rep. No. 627, 63rd Cong., 2d Sess., 2 (1914) (Emphasis added). See 51 Cong. Rec. 9911 (1914).

Before its enactment as Section 3 the criminal sanctions were stricken and the qualifying clause "where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce" was added. Otherwise, the language is substantially the same.

greatest agencies and instrumentalities of monopoly ever devised by the brain of man. It completely shuts out competitors, not only from trade in which they are already engaged, but from the opportunities to build up trade in any community where these great and powerful combinations are operating under this system and practice. By this method and practice the Shoe Machinery Co. has built up a monopoly that owns and controls the entire machinery now being used by all great shoe-manufacturing houses of the United States.[7] No independent manufacturer of shoe machines has the slightest opportunity to build up any considerable trade in this country while this condition obtains. * * *

"* * * The system is wholly bad for consumers and the general public, and in its last analysis detrimental to the interests of local dealers generally. We have penalized this practice under the provisions of section 4 [now section 3] and made it a misdemeanor punishable as prescribed in the section." H.R. Rep. No. 627, 63rd Cong., 2d Sess., 11-13 (1914) (Emphasis added).

Similarly, on the floor of Congress, from the very beginning of the debates, the bill was treated as one designed for the protection of buyers from over-powerful sellers or lessors. For example, Congressman Webb, a member of the House Committee on the Judiciary, to

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7. Congress was particularly disturbed by the practice of United Shoe to lease patented machinery essential to successful competition in the industry, on condition that supplies and non-patented machines be obtained from the lessor. See *United Shoe Machinery Corp.* v. *United States*, 258 U. S. 451 (1922). Thus, after the House version of the bill had been substantially approved by the Senate Committee, the Section was changed on the floor of the Senate so as to apply exclusively to the practice of tying non-patented articles to a sale or lease of a patented article. 51 Cong. Rec. 14273-76 (August 26, 1914). The broader coverage was restored in Section 3 as finally agreed to in conference. See H.R. Rep. No. 1168, 63rd Cong., 2d Sess., 2, 11 (1914).

which the bill had been referred, described its purpose as follows:

> "• • • I contend, Mr. Chairman, that no one has the right to *sell* goods to a purchaser and receive his money for them and at the same time *compel* such purchaser to refuse to sell a competitive article. Such contract in itself is in restraint of trade and tends directly to monopoly. This practice has been in vogue in the United States for 20 years, and there is scarcely a retail merchant throughout this broad land who has not suffered from such practice, because our country has been literally plastered with these exclusive-sale contracts. • • •" 51 Cong. Rec. 9072 (May 22, 1914) (Emphasis added).

Congressman Webb later amplified this view:

> "It means simply this, that if I am a manufacturer or a wholesaler, and go to a small town and pick out the most popular merchant in that town —I have advertised my goods well—and, of course naturally he is anxious to buy them. I go to this most popular merchant and tell him that I will let him buy my goods, provided he will not sell or carry in stock any of my competitor's goods. Now, I do not know how other gentlemen may look at such a contract, but that contract, in my opinion, is in and of itself a contract in restraint of trade. • • •
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> "• • • I do not believe there is a man on either side of the House who will say that it is right or fair business for a manufacturer to make a contract with the merchant to sell only his goods and that he shall not sell goods that compete with his. It ought not to be allowed." 51 Cong. Rec. 9406, 9407 (May 28, 1914).

To Congressman Floyd, also a member of the House Judiciary Committee, the statute was an act of liberation for the local independent merchant:

> "• • • The object of this section is to break up the power of giant monopoly and to liberate and free every small dealer in this land and put him in a position of independence in which he can do business in competition with any other business man in this country. • • •" 51 Cong. Rec. 9160 (May 23, 1914). See also 51 Cong. Rec. 9161 (May 23, 1914).

Congressman Taggert, who also was a member of the House Judiciary Committee, declared:

> "Section 4 of the bill will afford *relief* to retail dealers, who are now required by wholesalers to handle certain articles exclusively and become sole agents for certain goods. • • •" 51 Cong. Rec. 9198 (May 25, 1914) (Emphasis added).

In the Senate Section 3 (still Section 4 at that time) was explained in terms of striking down only contracts which prohibited a retailer from selling competing goods to his customers. Senator Reed, a member of the Senate Committee on the Judiciary, to which the Senate bill had been referred, explicitly stated this as the purpose of the bill:

> "• • • What the bill aims at is the case of a vendor of goods, selling them to a dealer upon the express provision, *not that the dealer will handle his goods, but that the dealer will not handle anybody else's goods,* thus depriving the public of the opportunity to buy both classes of goods over the same counter and in actual competition, and also depriving the dealer of his opportunity to buy in the open market and from whomsoever he pleases."

51 Cong. Rec. 14270 (August 26, 1914) (Emphasis added). See also 51 Cong. Rec. 14226 (August 25, 1914).

Finally, we would point out that the application of Section 3 to a contract for the supply of a consumer's requirements which was desired by both buyer and seller was expressly disavowed by the sponsors of the statute. Thus, in the hearings before the House Committee on the Judiciary, on February 26, 1914, Herbert Noble, an attorney, addressed the Committee on behalf of his client, John A. Roebling Sons Co., bridge builders who were also manufacturers of wire rope. Mr. Noble expressed concern lest Section 3 should be construed to ban the wire rope requirements contracts Roebling had made with industrial consumers. With Representative Clayton presiding in the Chair, Representative Charles C. Carlin of Virginia, a member of the Judiciary Committee, replied to Mr. Noble's queries as follows:

> "Mr. Carlin: I do not think this statute covers that.
>
> "Mr. Noble: It says you may not make an exclusive contract to buy all your goods from one man.
>
> "Mr. Carlin: No; it does not. It simply says a man shall not require you to make an exclusive contract to sell his goods only.
>
> • • •
>
> "Mr. Noble: Do you mean the word 'dealing' only refers to jobbers and not to consumers?
>
> "Mr. Carlin: *That statute has no reference to consumers.* It is intended to apply to merchants generally. • • •" Hearings before the Committee on the Judiciary of the House of Representatives on Trust Legislation, 63rd Cong., 2nd Sess., 967 (1914) (Emphasis added).

In short, the purpose of Congress was to strike solely at practices whereby economically powerful sellers sought to pre-empt or monopolize the market for their goods by forcing their customers to agree not to deal in or use goods offered by their competitors. Congress had no intention of drafting an Act that would strike down a contract such as that at bar.

B

The language of the Act is apt and appropriate to carry out the limited purposes Congress had in mind. It should not be so construed as to outlaw contracts which do not violate those purposes.

When the language of the Act is read in the light of this Congressional intent, we think it becomes perfectly clear that the words used are both apt and appropriate to describe the particular practices which Congress was attempting to prevent. In the first place, we submit that the natural implication of the words "It shall be unlawful • • • to • • • *make a sale or contract for sale* • • • or fix a price charged therefor, or discount from, or rebate upon, such price, *on the condition* • • • that the • • • purchaser thereof *shall not* • • •" is that it is unlawful for a *seller* to *impose* the exclusive dealing condition upon a buyer[8]. That is not the language one would normally use to describe a situation such as that at bar, where a seller and consumer with equal bargaining power, and for their mutual business advantage, have freely entered into a contract for the supply of a limited portion of the purchaser's requirements for a term of years. If that had been the intent of Congress, the Act need

8. That the Act is directed solely at sellers is indubitably shown by the fact that, as originally adopted by Congress, the Act made it a crime for a seller to impose such a condition. See note 6, *supra*.

merely have provided in this basic clause that "It shall be unlawful for any person to enter into a contract for the sale *or purchase* of a substantial quantity of goods • • •." But that is not what Congress provided.

It follows that there can be no illegality unless it is shown that the seller exacted, or at least had the economic power to exact, the restrictive condition from the purchaser. This is especially true where the buyer, the party for whose protection the statute was enacted, is the one seeking to enforce the contract. Thus, to allow the respondents to escape their obligations under the instant contract by resort to Section 3 would be a complete perversion of the intent of Congress in passing that statute.

Similarly, we think it is plain that the words of the qualifying clause, "where the effect of such • • • sale or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce" must be construed as referring only to an attempt to lessen competition or create a monopoly in the "relevant market"—*i.e.* the market in which the seller and its competitors can sell their goods. If this qualifying clause were intended to reach a single contract such as that at bar, whereby a buyer and seller, dealing at arm's length and with equal bargaining power, agree, each for his own business reasons, that the seller will furnish a part of the buyer's requirements, and such requirements can be said to be "substantial", then this part of the Act need merely have read: "where the sale or contract for sale covers a substantial volume of goods." A single consumer of fuel, such as petitioner, is not a "market", but merely one of the many thousands of potential customers who compose the market in which respondents and

their competitors can sell coal or other fuels. It is obvious that Congress never intended the Act to apply to such a situation.

The majority below concluded that simply because the Act "expressly refers to *'a'* contract for sale *'for use,* consumption or resale'" Section 3 of the Act was applicable to a situation such as that at bar (R. 68). But when these words are considered in the light of the expressed Congressional purpose, it becomes apparent that they were necessary in order to carry out that purpose. If a single contract were not made unlawful, the Act would not have reached a single contract with a chain-store company covering a substantial segment of the market. The use of the singular was also necessary in order to enable a single purchaser who considered himself injured by an unlawful exclusionary contract to bring a proceeding to have it set aside, or to recover treble damages in a suit brought under Section 4 of the Clayton Act.[9] Moreover, if the Act had omitted the words "use" and "consumption", it would not have been effective to reach tying contracts whereby patent holders such as United Shoe tied the sale of unpatented goods to the lease or sale of patented machinery or articles used or consumed in a manufacturing process—the particular practice which, as the legislative history shows, gave rise to the controversy resulting in the adoption of Section 3.

Thus, the use of these words was both necessary and appropriate to carry out the Congressional intent. They need not, and therefore, should not, be so construed as to extend the coverage of the Act to a family of contracts never contemplated by Congress. *Oates* v. *National Bank,* 100 U. S. 239, 244 (1879). No doubt, under that language, a contract for the supply of a single consumer's

9. 38 Stat. 731 (1914), 15 U. S. C. §15.

requirements might violate the Act if the seller were capable of imposing the exclusive dealing feature, and either the contract were one of a series of similar contracts designed to pre-empt the market or conceivably, the single consumer constituted so substantial a part of the market that the contract could be deemed to have the effect of substantially lessening competition therein. But it does not follow that the use of these words extends the coverage of the Act so as to include an isolated contract for consumption entered into under the circumstances here present.

C

Until the decision below, Section 3 has never been applied to a contract which did not embody the specific evils at which the Act was directed.

In the Courts below, respondents relied upon nine cases dealing with "tying" contracts and ten cases concerning "exclusive dealing" contracts. We believe that these include the leading cases in which a contract has been held unenforceable because of a violation of Section 3. An examination of these cases will show that every one of them was based upon a contract involving all of the elements which Congress had regarded as objectionable when it adopted Section 3, none of which is present in the contract at bar.

(1) While cases involving tying contracts are not directly relevant, they nevertheless establish that it is necessary under Section 3 to prove that the seller had sufficient economic leverage to induce a substantial number of buyers in the relevant market to deal exclusively with it. They show also that the Act is directed solely against the seller.

Of the cases involving tying contracts, five involved attempts to extend a patent monopoly over unpatented articles,[10] and in four, the seller was held to have such powerful market control over the "tying" product, even though it was not patented, as to enable it to restrain trade in the "tied" product.[11] Such contracts are intrinsically contracts in restraint of trade; straight requirements contracts are not. As Mr. Justice Frankfurter pointed out in *Standard Oil*, 337 U. S. at 305-06: —

> "• • • Tying agreements serve hardly any purpose beyond the suppression of competition. • • • In the usual case only the prospect of reducing competition would persuade a seller to adopt such a contract and only his control of the supply of the tying device, whether conferred by patent monopoly or otherwise obtained, could induce a buyer to enter one. • • •

10. *International Salt Co.* v. *United States*, 332 U. S. 392 (1947); *International Business Machines Corp.* v. *United States*, 298 U. S. 131 (1936); *Oxford Varnish Corp.* v. *Ault & Wiborg Corp.*, 83 F. 2d 764 (6th Cir. 1936); *Radio Corporation of America* v. *Lord*, 28 F. 2d 257 (3rd Cir. 1928); *United States* v. *Linde Air Products Co.*, 83 F. Supp. 978 (N.D. Ill. 1949).

11. *Northern Pacific Railway Co.* v. *United States*, 356 U. S. 1 (1958); *Judson L. Thomson Mfg. Co.* v. *Federal Trade Commission*, 150 F. 2d 952 (1st Cir. 1945), *cert. denied*, 326 U. S. 776 (1945); *Signode Steel Strapping Co.* v. *Federal Trade Commission*, 132 F. 2d 48 (4th Cir. 1942); *United States* v. *American Can Co.*, 87 F. Supp. 18 (N.D. Cal. 1949).

> "Requirements contracts, on the other hand, may well be of economic advantage to buyers as well as to sellers, and thus indirectly of advantage to the consuming public. • • •"

The contract at issue of course is not a tying contract so that these cases are not directly relevant. Nevertheless, they establish the proposition that there can be no violation of Section 3 of the Clayton Act in the absence of economic leverage based on the seller's control of the tying product. As Mr. Justice Black pointed out in holding a tying contract unlawful in *Northern Pacific Railway Co.* v. *United States,* 356 U. S. 1, 6-7 (1958):

> "• • • Of course where the seller has no control or dominance over the tying product so that it does not represent an effectual weapon to pressure buyers into taking the tied item any restraint of trade attributable to such tying arrangements would obviously be insignificant at most. As a simple example, if one of a dozen food stores in a community were to refuse to sell flour unless the buyer also took sugar it would hardly tend to restrain competition in sugar if its competitors were ready and able to sell flour by itself."

These cases are also significant in that in each case a seller or lessor or licensor was enjoined, at the suit of the Government or of a competitor of the seller, from enforcing tying agreements which it had a practice of exacting from a substantial number of merchants or manufacturers, as a condition to the purchase or license of the "tying" product. As we have seen, in the case at bar it is conceded that the seller had no market control whatever, and it is the seller itself which is attempting to avoid its contractual obligations, while the buyer is urging that they be carried out.

(2) Cases involving exclusive dealing contracts, which sometimes have been cast in the form of "requirements" contracts, likewise show that such contracts are unlawful only when the seller, having economic leverage, seeks to pre-empt a substantial segment of the market for his goods by the imposition of exclusive dealing agreements, and again the sanctions are directed solely against the seller.

The remaining ten cases cited by respondents in the Court below concern exclusive dealing contracts. Three[12] of the ten cases revolved around the abuse of patent privileges by specifications in licensing agreements that the licensee could not deal in competitive products. These cases are similar to the straight tying contract cases and were decided on the ground that the agreements were unlawful "as extending a patent monopoly beyond permissible limits" (185 F. 2d at 816). Thus they are not directly relevant for our purposes, since no abuse of patent rights is in any way in issue. However, like the tying contract cases, they show that the presence of economic leverage by a seller is the *sine qua non* of illegality.

In the seven straight exclusive dealing cases cited below by respondents, the courts invariably applied the same standards for determining unlawfulness which had led Congress to adopt Section 3: Economic leverage by the seller coupled with a practice of tying up a substantial segment of the relevant market by means of exclusive dealing agreements; and in each case the *seller* alone was enjoined from enforcing the prohibited agreements:

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12. *Dole Refrigerating Co.* v. *Kold-Hold Mfg. Co.*, 185 F. 2d 809, 816 (6th Cir. 1950); *McCullough* v. *Kammerer Corp.*, 166 F. 2d 759 (9th Cir. 1948), *cert. denied*, 335 U. S. 813 (1948); *National Lockwasher Co.* v. *George K. Garrett Co.*, 137 F. 2d 255 (3rd Cir. 1943).

(a) In all seven cases, the defendant sellers had economic leverage resulting from powerful positions in their respective markets. Thus, Standard Oil Company[13] sold its name brand gasoline to 23% of the Western market, and was the largest seller in that market; the members of the Fashion Originators' Guild[14] sold in the United States more than 60% of all women's garments wholesaling at $10.75 and above; Standard Fashion Company[15] sold its branded "Standard Patterns" to 40% of the retail pattern agencies in the country; Dictograph Products, Inc.,[16] seller of "Acousticon" hearing aids, was one of the nation's three largest hearing aid manufacturers; Anchor Serum Company[17] was the largest producer of various animal health products for sale to the general public, which it marketed under the name of "Anchor Products"; Richfield Oil Corp.[18] annually sold over $36,000,000 of branded gasoline under exclusive contracts with retailers blanketing a six-state area; and Pullman Company[19] was the sole supplier in the United States of railroad sleeping cars and sleeping car service.

(b) In all seven cases the defendants had followed a practice of requiring exclusive dealing agreements from a large number of key outlets, *i.e.* "the relevant mar-

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13. *Standard Oil Co. of California* v. *United States*, 337 U. S. 293 (1949).

14. *Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U. S. 457 (1941).

15. *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346 (1922).

16. *Dictograph Products, Inc.* v. *Federal Trade Commission*, 217 F. 2d 821 (2d Cir. 1954), *cert denied*, 349 U. S. 940 (1955).

17. *Anchor Serum Co.* v. *Federal Trade Commission*, 217 F. 2d 867 (7th Cir. 1954).

18. *United States* v. *Richfield Oil Corp.*, 99 F. Supp. 280 (S.D. Cal. 1951), *aff'd per curiam*, 343 U. S. 922 (1952).

19. *United States* v. *Pullman Co.*, 50 F. Supp. 123 (E.D. Pa. 1943).

ket," for their products: 6,000 retail gasoline outlets in the Western area,[13] 12,000 garment retailers throughout the country,[14] 40% of the 52,000 retail pattern agencies in the country,[15] 22% of the nation's one thousand choicest retail outlets for hearing aids,[16] the largest distributors of various animal health products in the key states of Illinois and Iowa (plus 14 other wholesalers),[17] 3,000 gasoline stations in the West,[18] the major railroads in the country.[19]

(c) In all seven cases the party asserting the illegality of the contracts was either the government acting in the interest of the public, or a dealer who wished to deal with competitors of the seller, and in each case the seller alone was forbidden to enforce the contract.

It is also to be noted that in all but two of the foregoing cases, the exclusionary agreement was in the form of an express condition. The two exceptions are *Standard Oil* and *Anchor Serum Co.* v. *Federal Trade Commission*, 217 F. 2d 867 (7th Cir. 1954) where the contracts were cast in the form of "requirements" contracts. But in these cases, while the contracts did not in terms contain the unlawful condition *in haec verba*, they had the identical effect: Instead of agreeing not to purchase from the seller's competitors, the purchasers, in one case some 6,000 gasoline filling station operators and in the other some 16 wholesalers of hog serum, agreed to buy all their requirements of gasoline or hog serum from the selling company. Thus while these contracts are generally described as "requirements" contracts, they were identical in every respect with the type of "exclusive dealing" agreement which was expressly condemned by Congress.

Thus, we do not know of a single case in which the Act has been applied to a contract which 1) did not in fact

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13-19. See page 35, *supra*.

prevent the buyer from dealing with the seller's competitors, 2) was not entered into by a seller who enjoyed a powerful bargaining position vis-a-vis the purchaser and 3) represented an isolated commercial transaction with a single customer in the available market for the seller's goods.

Nor do we know of a single case in which a seller has been permitted to evade his contractual obligations on the plea that the contract violated Section 3.

III

The contract at bar contains none of the evils at which Section 3 was directed.

As we have seen in Points I and II, *supra*, the contract at bar is not even an exclusive dealing agreement and therefore does not violate the basic evil at which the Act was directed. We shall now point out that even if the conclusion of the Court below that the contract comes within this portion of the Act were tenable, this contract would not be illegal because (a) it is conceded that the seller neither imposed nor had the economic power to impose the requirements provision, (b) the contract does not "substantially lessen competition or tend to create a monopoly" by tying up any substantial segment of the market for the goods of respondents and their competitors, and (c) it is manifest from the facts of this case that instead of lessening competition this contract created competition by breaking into an existing monopoly.

A

Concededly, the seller under the contract at bar did not impose and did not have the economic power to impose the "requirements" provision on the buyer.

As was expressly conceded by respondents in the Courts below:

> "The seller [respondents' predecessor] did not occupy a dominant position in the business of producing or selling coal. On the contrary, according to the plaintiff [petitioner] there are over 700 coal producers who produce coal suitable for its requirements * * *" (R. 43).

Indeed, respondents have gone so far as to insist that it was the buyer, petitioner, rather than the seller, which "had overwhelming power or leverage. It was the only large coal consumer in the area, and the seller was faced with intense competition in the depressed coal industry" (R. 43).

Thus it is undisputed that the seller in this case was not in a position to impose the allegedly unlawful requirements provision on the buyer and that it did not do so. On the contrary, the requirements provision was desired by and economically necessary to both buyer and seller. This, of course, is normally the situation when a requirements contract of this kind is entered into. Petitioner, as a regulated public utility, would not have constructed a coal burning plant at a cost of $3,000,000 more than a comparable oil burning station (R. 32) if it had not been assured of an adequate supply of coal at an agreed price for a sufficient term of years to justify the prudence of its investment. Moreover, it is the duty of a public

utility to make provision for the supply of its fuel requirements at reasonable prices for as long a period as possible so as to stabilize its rates to consumers.

It is, of course, equally true that in the case at bar the seller would presumably have been unwilling to spend in excess of $7,500,000 in preparation for its performance under the contract (R. 32) if it had not been assured that it could sell its coal at a price reasonable to it, and for a similar term of years.

Thus this contract bears no resemblance to the type of contract at which the Act was directed. Moreover, since no part of the contract was "imposed" by the seller on the buyer, there is a total absence of one of the primary evils at which the Act was directed.

B

In any event, the contract at bar does not "substantially lessen competition or tend to create a monopoly" within the meaning of the Act, since it involves only a single consumer whose maximum requirements would be less than 1% of the coal sold in the open market by respondents and their competitors.

Even if the contract at bar contained an exclusive dealing condition which had been imposed by the seller, it would not be unlawful because it does not meet the substantiality test contained in the qualifying clause. As we have pointed out above, petitioner is not a coal market. It is but one of the many thousands of consumers who constitute the market in which the respondents and their 700 competitors can sell their coal. Thus the contract at bar does not constitute part of a practice by the seller to pre-empt the market for its product by exacting

exclusive dealing provisions from as many of its customers as possible.

As pointed out by this Court in *United States* v. *E. I. duPont de Nemours & Co.*, 353 U. S. 586, 593 (1957):

> "Determination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act because the threatened monopoly must be one which will substantially lessen competition 'within the area of effective competition.'[20] *Substantiality can be determined only in terms of the market affected.*" (Emphasis added).

Despite this holding, the majority of the Court below made no attempt to define a market. It merely held the contract unlawful because the estimated "total dollar pre-emption over the life of the contract at the minimum price of $6.40 per ton would amount to $128,000,000.00. This is, of course, not insignificant or insubstantial" (R. 72). We submit that Judge Weick was correct when he dissented on the ground that:

> "I cannot consider a single contract with a single utility serving only 3% of the land area and 11% of the population of a single state as 'substantially lessening competition or tending to create a monopoly'." (R. 89; see R. 63).

It is a matter of common knowledge that coal—the subject matter of the contract at bar—is one of the most competitive products in this country.[21] See *Appalachian*

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20. Quoting from the statement in *Standard Oil* that "since it is the preservation of competition which is at stake, the significant proportion of coverage is that within the area of effective competition" (337 U. S. at 299-300 n. 5).

21. As respondents have stated: "* * * the seller was faced with intense competition in the depressed coal industry" (R. 43).

Coals, Inc. v. *United States*, 288 U. S. 344 (1933).[22] Six times as much land in the United States is underlain with coal deposits as is devoted to the production of wheat.[23] As Justice Reed remarked in *United States* v. *E. I. duPont de Nemours & Co.* 351 U. S. 377, 392 (1956), "If a large number of buyers and sellers deal freely in a standardized product, such as salt or wheat, we have complete or pure competition." By this definition, the coal industry is purely competitive. It presents a sharp contrast to the situation in the *Standard Oil* case, where exclusive supply contracts limited 6,000 retail gasoline outlets comprising 16% of the stations in the seven-state Western market to the use of "Standard" products, were also used for a similar exclusionary purpose by the six major competitors of Standard (which itself was the largest seller of gasoline in the market), and "effectively foreclose[d] whatever opportunity there may be for competing suppliers to attract [a dealer's] patronage" (337 U. S. at 295, 314). On the other hand, the contract at bar is an insignificant transaction in a fungible product which constitutes a drop in the bucket as far as the marketing of coal in this country is concerned. Official Government statistics indicate that, at the time the contract was entered into, the more than 700 coal producers which respondents have acknowledged are capable of supplying coal to petitioner (R. 43) produced an annual total of 359,289,000 tons of coal and sold in the

22. "• • • the bituminous coal industry under normal conditions affords most exceptional competitive opportunities." (288 U. S. at 368).

23. Compare Department of Interior, Geological Survey Circular 293, Coal Resources of the United States, p. 14 (1953) (424,450 square miles, *i.e.* 271,638,00 acres, of the United States were underlain with coal-bearing rocks in 1953) with Department of Agriculture Wheat Marketing Service, The Wheat Situation (WS-158), p. 12 (1958) (43,664,000 acres of the United States were in wheat production in 1957).

open market 290,567,000 tons annually.[24] Thus petitioner, which has estimated the *maximum* annual coal needs of Gannon Station at 2,250,000 tons (R. 27), is an insignificant outlet consuming the equivalent of less than 1% of the total amount of coal to be marketed by respondents' competitors, who are still free to sell their products to any of the multitude of fuel users in Florida and at least the other states east of the Mississippi River.[25] Moreover, in terms of all boiler fuels competing in the market, such as oil, coal, and natural gas, the amount of fuel covered by the contract at bar is even more infinitesimal.

To show that this contract substantially lessens competition or tends to create a monopoly within the meaning of the Act, it would be necessary for respondents to show that they had tied up a substantial segment of the "relevant market" within which there is "effective competition" between other sellers of boiler fuel and themselves. An isolated contract of sale whereby a single consumer such as petitioner arranges for the supply of a part of its fuel requirements from a single supplier cannot have any such result, and therefore cannot come within the purview of the Act.

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24. Bureau of the Census, 1954 Census of Mineral Industries, Distribution of Bituminous Coal and Lignite (Series: MI-12B), p 4 (1957).

These 700 producers are located in Districts 1-4, 6-11 and 13, as defined in the Bituminous Coal Act of 1937, 50 Stat. 91-94. The states included in these Districts are principally Alabama, Tennessee, Kentucky, Virginia, West Virginia, Pennsylvania, Ohio, Indiana and Illinois.

25. In terms of the total amount of fuel consumed in the state of Florida alone, the Court of Appeals for the District of Columbia has held that an amount of natural gas equivalent to 4,000,000 tons of coal per year, or almost twice the maximum quantity of fuel which can be affected by the instant contract, is "meager." *Florida Economic Advis. Coun.* v. *Federal Power Commission*, 251 F. 2d 643, 649 (D.C. Cir. 1957), *cert. denied*, 356 U. S. 959 (1958), *affirming* 16 F. P. C. 118, 146 (1956). (For a statement of fuel equivalents, see R. 31-32).

C

The contract at bar actually created competition by breaking into an existing monopoly and compelling it to reduce its prices.

The contract at bar not only failed to cause a substantial *lessening* of competition; it had the exact opposite effect of *creating* competition where none had existed before. As noted by the Court below, "at the time the contract was entered into, coal accounted for less than 6% of the fuel consumed in the entire state of Florida. Every electric generating installation in peninsular Florida burned oil at that time" (R. 67). Moreover, the contract represented the first time in recent decades that a significant quantity of coal was to be sold to *any* fuel user in peninsular Florida, which had long been monopolized by oil (R. 31). When the first coal burning unit at Gannon Station went into operation in August of 1957, the initial inroad upon this oil monopoly was made and—if respondents had not welched on their contractual obligations—would have been made by coal supplied by them. As the record expressly shows, shortly thereafter, respondents' competitor offered to supply coal for use in petitioner's oil burning units, with the direct result that petitioner's oil supplier was compelled to reduce its price in order to meet the new competition (R. 42). Nothing could be more in harmony with the antitrust laws. See, e.g., *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 495 & n. 16 (1940); *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344, 360 (1933); *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346, 355 (1922).

These facts clearly demonstrate the error of the Court below in stressing, as a basis for holding the instant contract illegal, the fact that "at the estimated 1959 rate of consumption, namely 700,000 tons per year, [Gannon

Station] would about equal peninsular Florida's annual coal consumption prior to the execution of the contract" (R. 72). This is only so because, prior to the contract, oil had a virtual monopoly of the Florida fuel business. Of course, when a new product is introduced into an area, the user of that product, at least at the time of its introduction, has a "monopoly." But there is nothing illegal in that. Under the Court's theory, if petitioner obtains the first atomic power plant in Florida, as it may well do by 1964 (R. 42-43), it will have an "illegal monopoly" of atomic power.

The competitive situation which confronts the Court in the instant case is almost identical with that presented to the Federal Power Commission in *In the Matter of Houston Texas Gas and Oil Corp. and Coastal Transmission Corp.*, 16 F.P.C. 118 (1956), *aff'd sub nom. Florida Economic Advis. Coun.* v. *Federal Power Commission*, 251 F. 2d 643 (D. C. Cir. 1957). In that case Houston Gas applied for a certificate of public convenience and necessity to serve peninsular Florida with natural gas. Because oil and coal can be used as boiler fuel as readily as natural gas, the Federal Power Commission, in the interest of preserving natural gas resources, had been reluctant to authorize natural gas service to utilities. In the *Houston Gas* case, however, the Commission thought that the public interest would best be served by supplying peninsular Florida with a fuel that could compete with oil:

> "Florida is a fuel have-not area of the nation, possessing practically no native usable energy supplies. Although it has a growing population and a considerable industrial potential, it is almost entirely dependent on imported energy to meet its domestic, industrial and power generating requirements. *Florida's dependency on imports consisting chiefly of petroleum products brought in by tanker*

and barge makes its economy vulnerable to interruptions of this single source of supply and is moreover undesirable from the competitive standpoint." (16 F.P.C. at 122-23) (Emphasis added).

• • •

"At the outset, we may observe that the fact that this arrangement involves the transportation of very substantial volumes of gas for use as boiler fuel does not require its rejection. In this regard, this case is *sui generis*. We have already detailed the characteristics of the Florida market which require us, in the public interest and within the limitations of our permissible discretion, to admit of a departure in this case from the standards we have heretofore applied in determining whether to approve of boiler fuel sales." (16 F.P.C. at 131-32).

Thus, in order to combat the Florida oil monopoly, the Federal Power Commission determined that it would depart from its prior policy of conserving the limited reserves of natural gas and permit it to be sold as fuel for power generating boilers in peninsular Florida. *Moreover, to ensure that natural gas gained an effective foothold in Florida, the Commission insisted upon twenty year requirements contracts and conditioned its approval of the plan on the parties agreeing to expunge all cancellation provisions from their contracts* (16 F.P.C. at 135). The Commission's determination was sustained by the Court of Appeals for the District of Columbia Circuit, where it was attacked by oil companies which complained that their business would be injured by the proposed pipe line. As the Court pointed out:

"• • • The 'injury' to petitioner [the oil concerns] is that it must share what has heretofore amounted to a power monopoly." *Florida Economic Advis. Coun.* v. *Federal Power Commission*, 251 F.

2d 643, 649 (D. C. Cir. 1957), *cert. denied*, 356 U. S. 959 (1958).

We respectfully submit that this Court, in applying antitrust laws expressly enacted to enhance competition, should be as influenced by the compelling circumstances of the Florida fuel situation as was the Power Commission in applying the Natural Gas Act.

In the context of Section 3 itself, *Excelsior Motor Mfg. & Supply Co.* v. *Sound Equipment, Inc.*, 73 F. 2d 725 (7th Cir. 1934), *cert. denied*, 294 U. S. 706 (1935), illustrates the determinative role of competitive factors similar to those considered by the F.P.C. in *Houston Gas.* In that case plaintiff sued for breach of a contract pursuant to which it was permitted to purchase the defendants' sound production equipment for resale, on condition that it not deal in competitive products and that it not resell the equipment below a certain fixed price. In other words, it was a true exclusive dealing contract, which, of course, the present contract is not. The Court rejected the sellers' defense based upon Section 3, because the contract, if performed, would have created competition in a field where none had existed previously:

> "It is difficult to believe that [the sellers] are serious in arguing that the contract in suit violates the Clayton Act because it fixes a resale price and provides that [the purchaser] shall not deal in the products of any competitor * * *. The evidence amply supports the finding of the trial court that the contract in suit did not violate the Clayton Act. On the contrary, had [the sellers] carried out the provisions of the contract and produced a successful machine at the price fixed, it would have tended to introduce some competition into a field where Western Electric Company had, by virtue of its being the first company to produce a commercially

practical equipment, a virtual monopoly." (73 F. 2d at 728).

Because the instant contract *created* rather than lessened competition, it cannot be held to violate the qualifying clause of Section 3, and the decision below must be reversed on this ground alone.

IV

By outlawing every substantial contract for the supply of a single consumer's requirements of raw materials, the decision below will cause grave injury to the economic life of the country and to public utilities in particular.

We believe that the inescapable conclusion from the logic of the decision below is that any contract for the purchase of a substantial volume of goods, even though the quantity be fixed by the contract, is unlawful. It is true that the Court below sought to distinguish the contract at bar from a contract for a fixed quantity, but as we pointed out at pages 16-17, *supra*, we think the Court's attempted distinction proves that, on the contrary, it is indistinguishable. Certainly, if the decision stands, we doubt if any responsible lawyer could advise his client that a contract for the purchase of a substantial volume of goods was beyond the reach of Section 3 of the Clayton Act.

But even if the Court's attempted distinction were valid, the decision below is certainly applicable to any contract for the supply of a single consumer's substantial "requirements," or even the substantial requirements of a single plant or factory of a single consumer, even though desired by the buyer, and regardless of whether or not it has any

substantial effect upon the available market for the seller's goods. We think we have demonstrated above that as a matter of law such a result is neither necessary nor consistent with the language of Section 3 when read in the light of the Congressional intent. We shall now show that from an economic standpoint such a result would not only do violence to the obvious and expressed intent of Congress, but would do grave damage to the economic life of the country.

This Court has had several occasions to consider the economic effect and necessity of contracts whereby industrial consumers make provision for their fuel requirements for a long term of years. For example, as long ago as 1931, in *Twin City Pipe Line Co.* v. *Harding Glass Co.*, 283 U. S. 353, 358 (1931) this Court held that such a requirements contract, which "was not arbitrarily or unfairly imposed upon the glass company [the buyer]," "does not subject the glass company to, or tend in any manner to impose upon the public, any wrong, disadvantage or evil attributable to monopoly or restraint of trade."

More recently, in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U. S. 332, 344 (1956), in holding that the Natural Gas Act had not outlawed long-term contracts for the supply of a utility company's requirements of natural gas, this Court pointed out:

> "• • • By preserving the integrity of contracts, [this decision] permits the stability of supply arrangements which all agree is essential to the health of the natural gas industry. Conversion by consumers, particularly industrial users, to the use of natural gas may frequently require substantial investments which the consumer would be unwilling to make without long-term commitments from the distributor, and the distributor can hardly make

such commitments if its supply contracts are subject to unilateral change by the natural gas company whenever its interests so dictate."

On the basis of that decision the Court also approved a 15-year contract for the supply of a public utility's requirements of electric power. *Federal Power Commission* v. *Sierra Pacific Power Co.*, 350 U. S. 348 (1956).

As we have seen, in the *Houston Gas* case the Federal Power Commission, with the approval of the United States Court of Appeals for the District of Columbia, has recently found such contracts economically necessary, and has insisted that, before a certificate of public convenience or necessity could be granted to a pipe line company to build a pipe line to supply gas to peninsular Florida, the seller should enter into binding 20-year requirements contracts with its major prospective customers. See pages 44-45, *supra*.

It is true that in these cases no question of a violation of Section 3 was raised and that each dealt with a regulated public utility.[26] We cite them primarily as illustrative of the economic background and necessity of a contract such as that here involved, and secondly, to point out that if the decision below were allowed to stand, grave doubt would be cast on the legality of contracts identical with those which this Court sustained in these cases. It must also be borne in mind that in the instant case petitioner is a regulated public utility.

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26. However, in the *Twin City* case discussed *supra*, the buyer—the largest consumer of natural gas in Fort Smith, Arkansas—desired to invalidate a full requirements contract for the supply of gas in order to be free to deal with a competitor of the seller, namely, a natural gas pipe line company which the buyer controlled. As we have seen, even though the contract necessarily precluded the buyer from dealing with a competitive source of fuel "so long as the pipe line company could adequately supply" the buyer's requirements (283 U. S. at 355), this Court held that it did not violate any anti-trust policy and was enforceable in accordance with its provisions.

The record discloses that, economically speaking, a long-term requirements contract was just as necessary to both the buyer and seller in the case at bar as it was in the cases above cited, if any business transaction between them was to take place at all. Just as it was necessary to have a requirements contract satisfactory to the Ideal Cement Company before it would erect a gas burning cement plant in Mobile, Alabama (see 350 U. S. at 336), so it was necessary for petitioner, particularly because it is a regulated public utility required to justify the prudence of its capital expenditures, to make firm and adequate provision for its future supplies of coal before it embarked upon the construction of a coal burning plant at a cost of over $3,000,000 more than it would have cost to build an oil burning plant (R. 32).

Similarly, the position of the sellers under the contract at bar was almost identical with that of the natural gas pipe line company in the *Houston Gas* case: As noted by the Court below (R. 67), the respondents have made an investment of over $7,500,000 in making preparation for the shipment of the coal involved in the contract from Uniontown, Kentucky, to petitioner's dock at Tampa, Florida (see R. 32), just as Houston Gas had to build a pipe line in order to serve its customers in peninsular Florida. Such investments cannot be safely made without long-term commitments.

This of course is substantially true in any situation where a utility company, manufacturer or other industrial consumer is arranging for the supply of the raw materials needed in its plant. It is always good business for such a consumer to make adequate and reliable arrangements for its future requirements at a price which it believes to be advantageous, and if a substantial investment must be made by either buyer or seller to carry out the contract, a long-term contract is absolutely necessary.

Thus the contract at bar is not unique or unusual. It is merely an example of the normal, simple and economically sound method by which consumers of substantial quantities of raw material in the manufacturing process customarily arrange for their supplies. We have no doubt that there are thousands of such contracts in this country. Congress never intended to outlaw such arrangements, for they involve none of the evils which Congress was attempting to prevent when the Act was under consideration. Moreover, we submit that Congress could not reasonably be expected to have so intended. For it is self-evident that the economic consequences on the business life of this country resulting from outlawing all such arrangements would be incalculable, especially for public utilities such as petitioner and the public they serve.[27] On this issue we refer to the statement of Judge Weick in his dissenting opinion below:

> "[Petitioner] was under obligation to the public to furnish a continuous supply of electricity at rates fixed by the public utilities commission. To meet these obligations it was not only desirable, but absolutely necessary that it be supplied with the boiler fuel to make the electricity. Its rates could not be fixed for any appreciable length of time if it were required to depend upon a fluctuating market price for boiler fuel. It would certainly not be in the public interest to require a utility to purchase boiler fuel on short term contracts or on the open market so that every time there was a shift in the market price, the utility's rates to the public would have to be adjusted. * * * A

27. As stated in the Report of the House Committee on the Judiciary: "The [Clayton] bill is not designed to destroy or hinder business, but on the contrary, to help business and the whole people of the country who are related to or affected by it." H.R. Rep. No. 627, 63rd Cong., 2d Sess., 7 (1914).

requirements contract • • • to ensure a continuing supply of boiler fuels at a constant price • • • is not only an economic necessity in circumstances such as these, but also serves the best interest of the public, who in the long run must shoulder the burden of increased costs of the utility." (R. 78-79, 81).

V

A seller cannot repudiate a contract of sale which the purchaser wishes to enforce on the alleged ground that it, the seller, unlawfully entered into the contract in violation of Section 3.

As we have seen, the sole purpose of Section 3 of the Clayton Act is the protection of buyers, as a class, from coercive action by powerful sellers. The Act by its very terms is directed only at the seller. It does not declare that any contract which contains an exclusive dealing condition shall be unlawful. It says merely that it shall be unlawful for any person to make a sale or contract of sale (*not* a purchase or contract of purchase) upon such a condition. Thus it is quite different from such statutes as Section 1 of the Sherman Act[28] which declare that certain contracts are unlawful in themselves. It follows that under Section 3 it is only the act of the seller in entering into a contract of sale on the prohibited condition that is unlawful. We submit that under these circumstances, the seller has no right under Section 3 to repudiate a contract which the purchaser wishes to enforce. For he should not be permitted to take advantage of his own unlawful act to the detriment of the party the Act was designed to protect.

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28. 26 Stat. 209 (1890); 15 U.S.C. § 1.

A brief look at the legislative history of Section 3 will demonstrate the validity of this conclusion. It will be recalled that as originally drafted, and as approved by the House Committee on the Judiciary and the full House of Representatives, Section 3 provided that "any person • • • who shall • • • *make a sale of goods* • • • on the condition • • • that the • • • purchaser thereof shall not use • • • the goods • • • of a competitor or competitors of the • • • seller *shall be deemed guilty of a misdemeanor* and upon conviction thereof shall be punished by a fine • • • or by imprisonment • • •". See note 6, *supra*. Surely, if Section 3 had been enacted in this form, respondents could not be heard to contend that because of *their* commission of a crime, petitioner, innocent of any wrongdoing and a member of the very class for whose protection the statute was enacted, should be denied the right to enforce the instant contract against the guilty seller. The *only* reason that the criminal sanctions which Section 3 originally imposed on the seller alone were excised by the Senate Judiciary Committee, and the Act was redrafted to read "it shall be unlawful • • • to make a sale • • •," was "because it was thought best, especially in view of the experimental stage of this legislation, that the harshness of the criminal law should not be applied but that the enforcement of the Section should be given to the Federal Trade Commission." S. Rep. No. 698, 63rd Cong., 2d Sess., 43 (1914). Thus respondents are no more justified in invoking the present Section 3 as a basis for escaping their contractual obligations than they would have been if the Act, as finally adopted, had merely declared them guilty of a crime.

This was the conclusion reached by the United States Court of Appeals for the Seventh Circuit, in a recent case in which a seller sought to escape its contractual obli-

gations by pleading its own unlawful act under Section 3. Like the instant case, *Beloit Culligan Soft Water Service, Inc.* v. *Culligan, Inc.*, 274 F. 2d 29 (7th Cir. 1959), was an action by purchasers for a declaratory judgment that a contract (a dealership franchise agreement) which defendant had with each of the purchasers was legal and enforceable. The agreements required the buyers to purchase all their requirements of various water-softening products exclusively from defendant, and in a prior proceeding instituted by the Federal Trade Commission, a consent decree had been entered specifically prohibiting the *seller* from enforcing them, on the ground that they violated Section 3 of the Clayton Act. Thereafter the defendant seller notified the buyers that, as the contracts were unlawful, they would not be carried out.

The Court held that the contracts could be enforced by the purchasers, basing its decision on the alternative grounds that (1) the "requirements" provision could be excised from the contracts in accordance with a severability clause which they contained, and (2) the defendant could not "use this illegal provision as an excuse for avoiding its own contractual obligations" (274 F. 2d at 35). On this second point, the Court stated:

> "In enacting the Clayton Act, Congress had in mind the protection of dealers. The House Report stated the legislation was designed to prevent an unfair trade practice which was '• • • *unfair to the local dealer* and to the community • • •' (Emphasis supplied.)
>
> "Courts are reluctant to invoke the doctrine of *in pari delicto* where to do so would manifestly work an injustice. Allgair *v.* Glenmore Distilleries Co., D. C. S. D. N. Y., 91 F. Supp. 93.
>
> "Corbin, in his treatise on contracts (6 Corbin, Contracts, §1540 (1951)) states:

"'If a bargain is illegal, not because a performance promised under it is an illegal performance, but only because the party promising it is forbidden by statute or ordinance to do so, the prohibition is aimed at that party only and he is the only wrong doer. * * * The other party, being himself subject to no prohibition or penalty, may even be one of the class of persons for whose protection the prohibitory statute was enacted.

"'In these cases the refusal of all remedy against a party to the illegal bargain would penalize the very persons for whose benefit the making of such a bargain is prohibited or declared illegal. In such cases, in order to attain the purposes of the law, the courts have frequently enforced the bargain by one or more of the usual remedies, in favor of a party for whose benefit the law was intended and against a party toward whom the prohibition or penalty was directed. * * * There is no reason why, in a case otherwise proper, a decree for specific performance should not be granted.'

"We hold the case at bar is not one in which the defense of *in pari delicto* may be used to deny relief to the plaintiffs." (274 F. 2d at 35).

And so the Act has been consistently construed. As we have pointed out, in every case in which a contract has been held unlawful under the Clayton Act the judgment was directed solely against the seller and never against the purchaser. Indeed, except for the decision below, we know of no case in which a seller has been permitted to avoid its contractual obligations on the contention that it had unlawfully entered into a contract in violation of Section 3, and we submit that it would be a perversion of the purposes of the Act as well as of sound principles of justice to permit a seller to do so. As Mr. Justice Frankfurter stated in his dissent in *Federal Trade Commission*

v. *Motion Picture Advertising Service Co.*, 344 U. S. 392, 402 (1953): "in the *Standard Oil* case we • • • pointed out that the retailers [i.e. purchasers] *might still insist on exclusive contracts if they wanted*" (Emphasis added).

Moreover, on several occasions this Court has made clear that it will not permit the avoidance of contractual obligations by judicially adding to the antitrust laws remedies not expressly authorized by Congress. Thus, in *Bruce's Juices* v. *American Can Co.*, 330 U. S. 743 (1947), the Court refused to permit a buyer to escape payment of the purchase price of goods, on the ground that the seller had violated the Robinson-Patman Act by selling similar goods to others at a lower price. The Court reasoned:

> "The Act prescribes sanctions, and it does not make uncollectibility of the purchase price one of them. • • • This triple damage provision to redress private injury and the criminal proceedings to vindicate the public interest are the only sanctions provided by Congress.
>
> "It is contended that we should act judicially to add a sanction not provided by Congress by declaring the purchase price of goods uncollectible where the vendor has violated the Act. It may be admitted as argued that such a sanction would be an effective enforcement provision. Addressed to Congress, this argument might be persuasive, but the very fact that it would obviously be an effective sanction makes it even more significant that the Act made no provision for it; that no committee dealing with the Robinson-Patman Act proposed it; that not one word suggesting its consideration appears in the debates of Congress; no proponent of the Act pointed out in its favor that it would be self-enforcing because of this sanction; and no opponent pointed with alarm to the consequences of such a drastic sanction on the commerce of the nation." (330 U. S. at 750-51).

Similarly, specific remedies are provided for a violation of Section 3 of the Clayton Act, namely, a treble damage action[29] or suit for injunctive relief[30] by the injured party, and a proceeding by the United States[31] or Federal Trade Commission[32] for an injunction or cease and desist order. And there is not one word in the statute or in the relevant legislative history to support the theory that Congress intended Section 3 to be available to a *seller* as a basis for escaping its just contractual obligations; indeed, as we have seen, the opposite result is suggested.[33] To hold that a contract is unenforceable by the buyer if the seller establishes its own violation of Section 3 would be even more judicially inappropriate than to deny the seller the right to enforce payment of the purchase price in *Bruce's Juices*. As we have seen, in that case it was assumed that the plaintiff had violated the Robinson-Patman Act, while in the instant case petitioner, as the buyer, did not violate Section 3 by entering into the contract it now seeks to enforce.

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29. 38 Stat. 731 (1914); 15 U.S.C. § 15.
30. 38 Stat. 737 (1914); 15 U.S.C. § 26.
31. 38 Stat. 736 (1914); 15 U.S.C. § 25.
32. 38 Stat. 734 (1914); 15 U.S.C. § 21.
33. It may also be noted that at the time the Clayton Act was adopted, Congress had before it a bill which would have provided "that it shall be a complete defense to any suit arising out of any contract * * * that the plaintiff, * * * at the time of the making of such contract, or of its alleged breach, * * * or at the time of the beginning of said suit, was engaged in carrying on business in any manner or to any extent in violation of the provisions of this Act." S. 2552, 63rd Cong., 1st Sess. (1913); companion bill H. R. 54, 63rd Cong., 1st Sess. (1913). See Lockhart, *Violation of the Anti-trust Laws as a Defense in Civil Actions*, 31 Minn. L. Rev. 507, 510-11 (1947). That this bill was not incorporated into the Act but died in committee further indicates that Congress, in enacting the Clayton Act, did not intend that Section 3 be available as a broad defense in a contract action between private litigants.

Supplementing the mandate of *Bruce's Juices* is a series of cases in which this Court has enunciated the doctrine that "the federal courts should not be quick to create a policy of nonenforcement of contracts beyond that which is clearly the requirement of the Sherman Act." *Kelly* v. *Kosuga*, 358 U. S. 516, 519 (1959). Because "the Sherman Act's express remedies could not be added to judicially by including the avoidance of private contracts as a sanction" (358 U. S. at 519), this Court has permitted sellers guilty of violating that Act to collect the purchase price of goods[34], or even damages for refusal to accept goods at the purchase price[35], from buyers raising "the plea of illegality" (358 U. S. at 518). As this Court stated in *Kelly* v. *Kosuga* in words very pertinent to the case at bar:

> "If the defense of illegality is to be allowed as a collateral method of enforcement of the antitrust laws, as the breadth of the [buyer's] argument suggests, it must be said that his theory creates a very strange class of private attorneys general." (358 U. S. at 520).

To allow respondents to invoke Section 3 as a successful defense to this action would be directly inconsistent with the foregoing rulings that "the defense of illegality" should be narrowly confined to those cases where "the judgment of the Court would itself be enforcing the precise conduct made unlawful by the Act" (358 U. S. at 520). As we have seen, nothing in Section 3 makes enforcement of the instant contract by petitioner unlawful.

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34. *D. R. Wilder Mfg. Co.* v. *Corn Products Refining Co.*, 236 U. S. 165 (1915); *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540 (1902).

35. *Kelly* v. *Kosuga*, 358 U. S. 516 (1959); *A. B. Small Co.* v. *Lamborn & Co.*, 267 U. S. 248 (1925). In these cases the plaintiffs, though wrongdoers, were permitted to enjoy the benefits of their (illegal) bargains by being awarded the difference between the contract price and the market price. See 358 U. S. at 518; 267 U. S. at 250, 252.

In conclusion, we respectfully submit that if this Court was unwilling to extend the express remedies of the Sherman and Robinson-Patman Acts so as to preclude sellers guilty of violating those Acts from asserting their full contractual remedies, it should not judicially supplement the Clayton Act to deprive a buyer *not* guilty of violating that Act of the same rights. Such a result would not only enable respondents to invoke their own wrongdoing as a basis for escaping their just contractual obligations, but would also cause a member of the class for whose benefit Section 3 was enacted to be penalized by the adoption of that statute.

CONCLUSION.

The judgment of the United States Court of Appeals for the Sixth Circuit should be reversed and the case remanded to the United States District Court for the Middle District of Tennessee, with directions to grant petitioner's cross-motion for summary judgment and deny respondents' motion for summary judgment.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1960

No. 87

TAMPA ELECTRIC COMPANY,
Petitioner,

v.

NASHVILLE COAL COMPANY, NASHVILLE COAL, INC. AND WEST KENTUCKY COAL COMPANY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENTS

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IN THE

Supreme Court of the United States

October Term, 1960

No. 87

TAMPA ELECTRIC COMPANY,

Petitioner,

v.

NASHVILLE COAL COMPANY, NASHVILLE COAL, INC. AND WEST KENTUCKY COAL COMPANY,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENTS

OPINIONS BELOW

The majority opinion (Miller, Chief Judge, and Cecil, J.) and the dissenting opinion (Weick, J.) of the United States Court of Appeals for the Sixth Circuit (R. 64-92),[1] filed on April 4, 1960, are officially reported at 276 F. 2d 766, *et seq.* The opinion (Wm. E. Miller, D.J.) of the United States District Court for

[1] The designation "R." will refer to the printed record. The designation "PB" will refer to petitioner's brief in this Court.

the Middle District of Tennessee, Nashville Division (R. 44-56), filed on November 18, 1958, is officially reported at 168 F. Supp. 456, *et seq.*

QUESTIONS PRESENTED

1. In an action brought by petitioner for declaratory judgment, did the courts below err in refusing, under Section 3 of the Clayton Act, to declare "valid, lawful and enforceable", and to enforce, a "requirements" contract which for 20 years commits the total coal purchases of a large utility to a single vendor, to the exclusion of hundreds of other willing and available sellers, in amounts exceeding the total annual coal consumption of the State of Florida?

2. In addition to Section 3 of the Clayton Act, do not the provisions of Sections 1 and 2 of the Sherman Act forbid a declaration that the contract is valid, lawful, and enforceable?

STATUTES INVOLVED

Both lower courts disposed of the case under Section 3 of the Clayton Act (38 Stat. 731, 15 U.S.C. § 14). In pertinent part, this section provides:

> "It shall be unlawful for any person . . . to lease or make a sale or contract for sale of goods . . . for use, consumption, or resale . . . on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

Respondents also challenged the contract as unlawful under Sections 1 and 2 of the Sherman Act (26 Stat. 209, as amended, 15 U.S.C. §§ 1-2), but the courts below did not find it necessary to consider the Sherman Act questions (R. 55, 74).

STATEMENT OF THE CASE

1. The nature of the case

This is an action for declaratory judgment, brought by petitioner pursuant to the declaratory judgment provisions of the United States Code. 28 U.S.C. § 2201 (Complaint, R. 4). Petitioner seeks a declaration that a 20 year requirements contract, here in issue, is "a valid, lawful and enforceable contract and is binding upon the plaintiff and defendants according to its terms" (R. 6).

In careful and detailed opinions, the District Court and the Sixth Circuit held that the contract was unlawful under Section 3 of the Clayton Act (R. 44-56, 64-92). Accordingly, the requested relief was denied and judgment was entered dismissing the complaint (R. 56, 64).

No coal has been delivered under the contract. Prior to the time for first delivery, respondents notified petitioner that they would not proceed with deliveries under the terms of the contract because of the advice of counsel that the contract was unlawful and unenforceable (R. 6, 20). Petitioner thereafter arranged to obtain its coal by contract with another supplier pursuant to a year-to-year contract, discussed below (R. 26-27).

Petitioner then filed its complaint which prays a declaration of the contract's validity as an entirety for its full 20 year term, and judicial enforcement of the contract "according to its terms" (R. 6).

The complaint seeks the prospective relief of enforcement of the contract in the form of a declaration of its validity and a decree enforcing its performance for its entire 20 year period. Respondents' defense is that this very contract is in itself prohibited by the antitrust laws, particularly Section 3 of the Clayton Act.

Both sides filed motions for summary judgment and supporting affidavits (R. 23-27, 28-43). The District Court granted respondents' motion and ordered the complaint dismissed. The Court of Appeals affirmed.

2. The facts

There is no dispute as to the facts. The contract was made between petitioner and respondents' predecessor (R. 5-6). It provided for the purchase and sale of all coal required by petitioner in existing and planned coal-burning facilities.[2] The contract expressly stipulated that the seller, for 20 years from the first delivery of coal under the contract, was "to supply the *total requirements*[3] of fuel of the Buyer for the operation of its first two units to be installed at [Buyer's] Gannon Station . . . which fuel requirements shall be not less than 225,000 tons of coal per unit per year" (R. 7). It was further agreed that "if during the first 10 years of the term of this contract the Buyer constructs additional units in which coal is used as the fuel . . . the fuel requirements thereof shall be added to this contract and be furnished by the Seller and accepted by the Buyer" (*ibid.*).

Six units were planned from the start (PB 3; R. 30). A third coal-burning unit was in fact under

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[2] Paragraph 8 of the Complaint described the contract as "a contract providing for the sale and delivery to plaintiff [petitioner] of *all of the coal* required by plaintiff for the production of electric energy at a new plant it was constructing . . ." (R. 5).

[3] Italics supplied here and elsewhere unless otherwise indicated.

construction when the suit was brought (PB 5; R. 31). The contract covered the requirements of this unit, as well as the first two, and also of any other coal-burning units that might be constructed within 10 years from the date of first delivery of coal under the contract. The term of the contract was specified as 20 years from first delivery (PB 5; R. 12). The contract contained no cancellation clause (R. 7-12). The minimum contract price was fixed as $6.40 per ton (R. 9-10).

The Gannon Station was and remains petitioner's only coal-burning facility. When the contract was signed in 1955, petitioner's two other plants were oil-burning (R. 30; PB 8). They are "presently oil burning" (PB 9, 10). The contract in issue engrosses petitioner's total existing coal requirements for its prescribed 20 year term.

Petitioner's actual coal requirements far exceed the minimum quantities specified in the contract. In a year-to-year contract made with another supplier after cancellation of the present contract, petitioner estimated its actual coal requirements as 700,000 tons in each of the years 1959 and 1960; 1,000,000 tons in 1961; and thereafter to "increase as required to about 2,250,000 tons per year" (PB 5; R. 27).

These requirements are most substantial. They far exceed, in terms of fuel equivalent, petitioner's total consumption in its oil installations, which corresponds to 825,000 tons of coal (R. 31). The minimum 700,000 ton consumption in 1960 equals the total amount of coal otherwise consumed in all of Peninsular Florida, also about 700,000 tons, when the contract was made (PB 6). Petitioner concedes "that within a very few years the Gannon Station would consume more coal

than was presently consumed in the entire State of Florida" (PB 6).

The dollar value of petitioner's coal requirements amounts to millions of dollars annually. At the minimum price of $6.40 per ton and the 1961 requirement of 1,000,000 tons (which petitioner says will increase to 2,250,000 tons), the annual value is $6,400,000 or $128,000,000 over the twenty-year period (R. 72).

Suitable coal for petitioner's coal requirements was and remains available from many suppliers. Petitioner admits that when the contract was executed

> "Potter Towing Company, the original contractor, was but one of some 700 coal producers who were not only able but 'eager' to sell coal to petitioner" (PB 6).

While this case was pending, petitioner's president testified as follows in a 1958 proceeding before the Florida Railroad and Public Utilities Commission (R. 62):

> "Q. Now, have you contacted any other company to see——
>
> A. Coal companies?
>
> Q. Coal companies.
>
> A. We have coal companies in and out of our office so fast that the receptionist doesn't know where to seat them to give them time to talk to people."
>
> * * *
>
> "A. We have received innumerable offers of coal at various prices per ton. I couldn't possibly sit here and remember which price of coal per ton related to the BTU's per pound or any number of such things."

Petitioner did not need to make a 20 year contract to obtain its coal requirements. In fact, petitioner

later made a contract, to replace the contract in issue, with Love & Amos Coal Company, on a 12-month basis. That contract expressly provided: "Cancellable on 12 months notice by supplier or purchaser" (R. 27).[4]

At the time that petitioner filed the present action for declaratory judgment, no coal had been delivered under the contract in issue (R. 6).

SUMMARY OF ARGUMENT

This is an action for declaratory judgment under 28 U.S.C. § 2201 (Complaint, R. 4). It seeks the prospective relief of a declaration that a 20 year, full requirements contract for coal is "a valid, lawful and enforceable contract and is binding upon the plaintiff and defendants, according to its terms". No coal has been delivered under the contract (R. 5-6; PB 5). There is no cancellation clause (R. 7-12).

If petitioner were granted relief, the "judgment of the Court would itself be enforcing the precise conduct made unlawful by the [Clayton] Act" (*Kelly* v. *Kosuga*, 358 U.S. 516, 520 (1959). That conduct is the performance of a contract foreclosing all competitors of the seller from any opportunity to supply the buyer's coal requirements for a period of 20 years.

As an avowed "total requirements" agreement, covering all of petitioner's coal-burning facilities, the contract is "a particular form of agreement specified by Section 3" (*Standard Oil Co. of California* v. *United States*, 337 U.S. 293, 311 (1949)).

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[4] The Love & Amos contract further provided (*ibid.*):

"In the event West Kentucky Coal Company should begin to perform under our original contract with Nashville Coal Company this agreement will terminate forthwith."

The 20 year term of the contract compounds the offense.

> "As a competition killer the long term contract is an effective weapon, . . ." Even a patentee is not so secure against the passage of time" (*United States* v. *Pullman Co.*, 50 F. Supp. 123, 129 (E.D. Pa. 1943), *aff'd* 330 U.S. 806 (1947)).

A duration of more than one year for requirements contracts has been held excessive under both the Sherman and Clayton Acts. *Federal Trade Commission* v. *Motion Picture Advertising Service Co.*, 344 U.S. 392, 395-397 (1953); *United States* v. *Linde Air Products Co.*, 83 F. Supp. 978, 982 (N.D. Ill. 1949); *United States* v. *American Can Co.*, 87 F. Supp. 18, 31 (N.D. Cal. 1949).

The contract covers all of petitioner's existing and planned facilities in which coal can be burned. The decisions of this Court are opposed to the argument that Section 3 is inapplicable because possible, and entirely theoretical, future developments might enable petitioner to buy coal outside of the contract. In *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U.S. 346, 354-355 (1922), it was held immaterial that the exclusion was limited to the buyer's existing "premises". In *International Salt Co.* v. *United States*, 332 U.S. 392 (1947), Section 3 condemned the contracts although satisfactory competing machines were available and the customers could buy and use them free of International's restraint.

Section 3 applies to a single contract. It prohibits "*a* sale or contract for sale" . . . "on the condition, agreement or understanding that the *lessee* or *purchaser* . . . shall not use or deal in the goods of *a com-*

petitor or competitors of the *lessor* or *seller.*" Section 3 is not confined to sales for resale. It expressly applies to a lease or sale "*for use, consumption or resale*".

Petitioner's use of oil is beside the point. Section 3 forbids the foreclosure of "*a* competitor or competitors of the lessor or seller . . . *in any line of commerce.*" Coal is "*one* out of *all* the various lines of commerce" (*George Van Camp & Sons Co.* v. *American Can Co.*, 278 U.S. 245, 253 (1929)). It has "sufficient peculiar characteristics and uses" to distinguish it from oil (*United States* v. *E. I. duPont de Nemours & Co.*, 353 U.S. 586, 593-594 (1957)).

For Section 3 purposes there is no relevance in the *Cellophane* case standard of interchangeability (PB 15, n. 3). *United States* v. *E. I. duPont de Nemours & Co.*, 351 U.S. 377 (1956). Coal and oil are not interchangeable in petitioner's facilities. The question in the *Cellophane* case was the existence of monopoly power violating Section 2 of the Sherman Act in the absence of evidence of any "alleged attempt to monopolize or conspiracy to monopolize" (351 U.S. at 370). The Court emphasized that it was not confronted with a case involving a specific practice eliminating competition. It said (351 U.S. at 395):

> "Illegal monopolies under § 2 may well exist over *limited products in narrow fields where competition is eliminated.* That does not settle the issue here."

The scope of the present inquiry is properly confined to "limited products in narrow fields" in view of the actual elimination of competition. There are 700 qualified sellers "not only able but 'eager' to sell coal to

petitioner" (PB 6). Petitioner has "received innumerable offers of coal at various prices per ton" (R. 62).

The effect of the present contract "may be to substantially lessen competition or tend to create a monopoly" (38 Stat. 731, 15 U.S.C. § 14). Petitioner's own estimates of the actual annual requirements of its coal plant are 700,000 tons in 1959 and 1960; 1,000,000 tons beginning in 1961; and, ultimately, "2,250,000 tons per year" (PB 5, R. 27). At the 1960 level of 1,000,000 tons, and the minimum contract price of $6.40 per ton, the preemption is $6,400,000 annually or $128,000,000 over the 20 year contract term. This total exceeds the amount of coal otherwise consumed in Florida (PB 6).

The volume of preemption overwhelmingly satisfies Section 3. In *International Salt*, where the tying contracts preempted only $500,000 of business annually (332 U.S. 395), this Court held that:

> "The volume of business affected by these contracts cannot be said to be insignificant or insubstantial."

In *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 608-609 (1953), the Court confirmed the rule that evidence of the restraint of "a substantial volume of commerce" alone condemns a contract subject to Section 3.

Section 3 requires no proof of the seller's dominance or economic leverage over the buyer. In *Standard of California, supra*, the Court expressly recognized that the seller did not have a dominant position in the market (337 U.S. at 302, 309). In *Times-Picayune, supra*, the Court pointed out that Section 3 is violated either when "a monopolistic position in the market" is enjoyed by the seller "*or*" when there is restraint "of

a substantial volume of commerce". The emphasis on the disjunctive is in the Court's opinion. (345 U.S. at 608-609).

If a seller's "leverage" limitation were read into Section 3, the statute would have little or no application to the soft coal industry. It is a chronically depressed industry in which buyers historically dominate sellers. Excess productive capacity has made "the market for coal a buyers' market for many years past." (*Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344, 364 (1933)). The same condition persists today. Petitioner agrees that when it made the contract with respondents' predecessor, "the seller was faced with intense competition in the depressed coal industry" (PB 40; n. 21).

The economic leverage concept would seriously encumber the administration of Section 3. To demand evidence of the parties' comparative economic strength "would be a standard of proof if not virtually impossible to meet, at least most ill-suited for ascertainment by courts" (*Standard Oil Co. of California, supra*, 337 U.S. at 310).

Petitioner's attempted economic justifications are irrelevant. The Court in *Standard* exhaustively reviewed all possible economic advantages of requirements contracts, including those pressed by petitioner in this case (337 U.S. at 306-308). But it held them irrelevant, stating:

> "Congress has authoritatively determined that [requirements] practices are detrimental where their effect may be to lessen competition. It has not left at large for determination in each case the ultimate demands of the 'public interest'" (337 U.S. at 311).

There was no necessity for a 20 year requirements contract in the present case. This is clear from petitioner's replacement contract with Love & Amos Coal Company. This expressly provides: "Cancellable on 12 months notice by supplier or purchaser" (R. 27). It is also admitted that petitioner "received innumerable offers of coal at various prices per ton" (R. 62).

Petitioner cannot escape the force of Section 3 on the basis of the legislative debates. In *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U.S. 346, 357 (1922), a Section 3 requirements case, the Court said:

> "Much is said in the briefs concerning the reports of committees concerned with the enactment of this legislation, but the words of the act are plain, and their meaning is apparent, without the necessity of resorting to the extraneous statements and often unsatisfactory aid of such reports."

In any event the legislative utterances which petitioner cites are directly refuted by other utterances of equal or greater dignity. See, e.g., 51 Cong. Rec. 9072, 9388-9, 9402, 9406, 14,210; S. Rep. No. 698, 63rd Cong., 2d Sess., 1914, p. 1; H. Rep. No. 627, 63rd Cong., 2d Sess., 1914, p. 12.

Petitioner's final point—that the seller cannot raise the defense of violation of Section 3—means that petitioner is asking this Court to command the seller to proceed, for 20 years, with the performance of an unlawful act. This is prohibited by the doctrine of *Kelly* v. *Kosuga, supra,* 358 U.S. 516, 520, that relief will be denied where "the judgment of the Court would itself be enforcing the precise conduct made unlawful by the Act." Compare *Continental Insurance Co.* v.

United States, 259 U.S. 156, 171-173 (1922); *Texas & Pacific Railway Company* v. *S. O. Pottorff*, 291 U.S. 245, 260 (1934); *Weil* v. *Neary*, 278 U.S. 160 (1929); *Sage* v. *Hampe*, 235 U.S. 99 (1914); *St. Louis V. & T.H.R. Co.* v. *Terre Haute & I.R. Co.*, 145 U.S. 393 (1892); *Gibbs* v. *Consolidated Gas Co. of Baltimore City*, 130 U.S. 396 (1889).

This line of argument is incompatible with the overriding public policy of the Clayton Act. Cf. *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U.S. 173, 177 (1942); *Scott Paper Co.* v. *Marcalus Mfg. Co.*, 326 U.S. 249, 257 (1945).

The formula used in Section 3 appears throughout the Clayton Act. For example, Section 7 provides "that no corporation . . . shall acquire" the stock or assets of another in certain circumstances (38 Stat. 731, as amended 64 Stat. 1125, 15 U.S.C. § 18). Petitioner's thesis would mean that the selling company in an unlawful merger under Section 7 could nevertheless compel performance by the buyer, because the statute reads only that "no corporation shall acquire".

Petitioner's thesis is also unfair. It would mean that the buyer could at any time terminate its performance, but the seller would be bound for 20 years. Further, petitioner's position would invalidate the contract for lack of mutuality of obligation. Compare *Jarrett* v. *Pittsburgh Plate Glass Co.*, 131 F. 2d 674, 676 (5th Cir. 1942).

Although the lower courts did not reach the Sherman Act questions, they may be considered here. *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 214 (1951). The contract is also invalid under the Sherman Act.

The 20 year term of the contract is indefensible by Sherman Act standards. *Federal Trade Commission* v. *Motion Picture Advertising Service Co.*, 344 U.S. 392 (1953); *United States* v. *Pullman Co., supra*, 50 F. Supp. at 129; *United States* v. *American Can Co., supra*, 87 F. Supp. at 31. Considering the substantial size of the market preempted, the contract embodies an unreasonable restraint within the meaning of the Sherman Act. *International Salt, supra*, 332 U.S. at 396.

ARGUMENT

A. THE COMPLAINT SEEKS SPECIFIC ENFORCEMENT OF THE UNLAWFUL CONTRACT: OF "THE PRECISE CONDUCT MADE UNLAWFUL BY THE CLAYTON ACT".

The complaint alleges, and the answer admits, that enforcement is sought of

> "a contract providing for the sale and delivery of all the coal required by plaintiff for the production of electrical energy at a new plant it was constructing near Tampa, Florida, for a period of twenty years" (R. 5, 19).

The complaint further alleges that respondents refused to perform the contract "on the ground that said contract is violative of Section 3 of the Clayton Act" (R. 6). This is also admitted by the answer (R. 20).

The relief sought is a "judgment declaring" that the contract

> "is a *valid, lawful and enforceable contract* and is binding upon the plaintiff and defendant, *according to its terms*" (R. 6),

The complaint reveals on its face that such a "judgment of the Court would itself be enforcing the pre-

cise conduct made unlawful by the [Clayton] Act" (*Kelly* v. *Kosuga*, 358 U.S. 516, 520 (1959)). That conduct is the performance of a contract foreclosing all competitors of the seller from any opportunity to supply the buyer's coal requirements for a period of 20 years.

Unlike the contract enforced in *Kelly* v. *Kosuga*, the unlawful agreement is not collateral to the contract which petitioner would enforce. The contract in issue is, in and of itself, the unlawful agreement. The Clayton Act violation is the coal sale contract between buyer and seller which petitioner asks the Court to declare lawful and to enforce "according to its terms".

In *Kelly* v. *Kosuga*, the alleged Sherman Act violation was not the onion sale contract between the litigating seller and buyer. That contract merely "furnished the occasion for [the] restrictive agreement. . . ." (358 U.S. at 521). As the Court said, the contract there in suit was a "lawful sale for a fair consideration [which] constitutes an intelligible economic transaction *in itself*" (358 U.S. at 521). The Sherman Act defense was based on circumstances collateral to that contract, namely an agreement "not to deliver any onions on the futures market for the remainder of the current trading season" (358 U.S. at 517).

In *Kelly* v. *Kosuga*, the onions had been delivered or set aside for delivery to the buyer. The buyer had made some payments for the onions, but had not paid the balance. The action was for the balance due. It was the Court's position that "it can hardly be said to enforce a violation of the [Sherman] Act to give

legal effect to a completed sale of onions at a fair price" (358 U.S. at 521).[5]

In the present case, however, no coal has been delivered under the contract. If the Court enforces this contract "according to its terms", it will "give legal effect" to an executory contract embodying the precise exclusion of competition prohibited by the Clayton Act.

This contract is annexed to the complaint as "Exhibit A" (R. 5, 7-12). Its terms, as written, violate Section 3 of the Clayton Act, according to decisions of this Court.

If this Court should reverse the lower courts and enforce the present contract, it would be inviting the proliferation in our economy of a powerful anti-competitive contractual device: the long-term requirements contract. This device would remove huge segments of commerce from the competitive market-place; it would tie producing and selling companies together in arrangements secured against competitors. As the three-judge trial court said of 25 year contracts in *United States* v. *Pullman Co.*, 50 F. Supp. 123, 129 (E.D. Pa. 1943), *aff'd* 330 U.S. 806 (1947):

> "As a competition killer the long term contract is an effective weapon. . . . Even a patentee is not so secure against the passage of time."

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[5] The Court expressly pointed out that if the action had sought enforcement of the collateral agreement to withhold onions from the future's market, relief would have been denied: ". . . the nondelivery agreement between the parties could not be enforced by a court, if its unlawful character under the Sherman Act be assumed . . ." (358 U.S. at 521).

In the present case, the contract not only effectively ties a particular seller to a particular buyer for 20 years; it also removes from the competitive market a majority of the coal business of the entire State of Florida (see pp. 5-6, *supra*).

B. THE CONTRACT IS WITHIN THE CATEGORY PROHIBITED BY SECTION 3: A CONTRACT "ON THE CONDITION, AGREEMENT OR UNDERSTANDING" THAT THE BUYER WILL NOT "USE OR DEAL IN" THE GOODS OF A COMPETITOR OR COMPETITORS OF THE SELLER, WHICH SUBSTANTIALLY LESSENS COMPETITION IN A LINE OF COMMERCE.

1. The contract excludes other suppliers of coal

Petitioner's basic argument is that the contract does not come within the category prohibited by Section 3 (PB 13-19). We respectfully submit that this argument is totally foreclosed by the statute and the decisions of this Court. *Standard Oil Co. of California* v. *United States*, 337 U.S. 293 (1949); *United States* v. *Richfield Oil Corp.*, 343 U.S. 922 (1952); *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U.S. 346 (1922); see also *Dictograph Products, Inc.* v. *Federal Trade Commission*, 217 F. 2d 821 (2d Cir. 1954), *cert. denied*, 349 U.S. 940 (1955); *Anchor Serum Co.* v. *Federal Trade Commission*, 217 F. 2d 867 (7th Cir. 1954).

Petitioner first seems to rely upon the fact that the contract does not contain any express exclusion of competitors (PB 13). This, of course, is immaterial. The Court has already ruled that a requirements contract is "a particular form of agreement specified by Section 3" (*Standard of California, supra*, 337 U.S. at 311).

Petitioner next contends that it might in the future convert any of its presently oil-burning units to coal,

and that it might construct new coal-burning units after the lapse of 10 years from the date of first deliveries under the contract. If either of these events occurred, petitioner states, the contract would not confine the coal requirements of such units to respondents.

The answer to these contentions may be succinctly stated. The contract covers *all* of petitioner's existing requirements of coal, for a 20 year period. The contract totally excludes, for 20 years, any competitor from this huge market for coal, which petitioner itself estimated would rise to 2,250,000 tons per year (R. 27).

As the Court of Appeals found: "At the time the contract was made, there were no coal burning units not covered by the contract. There is nothing to indicate any planned or probable conversion of oil burning units into coal burning units or construction of coal burning units not covered by the contract.[*] The contract requires the appellant to purchase all of its present, and its planned future, requirements of coal from a single seller." (276 F. 2d at 772; R. 71).

The Court of Appeals expressed its agreement with the conclusion of the District Judge that "[t]he question must be decided upon the basis of realities and the contract construed reasonably in the light of existing facts" (276 F. 2d at 772, R. 71; 168 F. Supp. at 458, R. 47). The Court of Appeals added that "The remote possibility that a buyer might use a competitor's product is an immaterial factor in the actual picture before

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[*] *After* commencement of this litigation, petitioner procured an offer from Peabody Coal Co. to furnish coal for two of its oil-burning units if petitioner should convert them. The offer was not accepted by petitioner, and there is no indication anywhere in the record of an intention to convert. (PB 14).

the Court", citing authorities (276 F. 2d at 772; R. 71-72).[7]

As the District Judge concluded, "the unalterable fact remains that the contract at issue is one which 'pre-empts' or 'engrosses' *all of the known coal requirements of the Buyer*—manifestly a large and substantial volume of commerce—for a period of 20 years" (168 F. Supp. at 458-459; R. 47).

As we shall show, pp. 20-21, *infra*, the decisions of this Court have in substance rejected petitioner's position that possible future developments which might enable it to buy coal outside of the contract are entitled to consideration. Indeed, if petitioner's argument were accepted, it is difficult to visualize any contract that might be outlawed under Section 3. It could always be established that the buyer might possibly have future needs that are not covered by the requirements contract.

For example, if General Motors contracted for the total steel requirements of all of its plants from Bethlehem Steel for 20 years, the contract could be defended on the grounds that General Motors might build ad-

[7] It is clear that petitioner contemplated that all of its Gannon units would use coal, and would be covered by the contract. Petitioner does not assert the contrary, and the record contains the following indication: Six units were projected for the Gannon station. In its contract with Love & Amos Coal Company, made after cancellation of the present contract, petitioner estimated its requirements for the Gannon station as about 2,500,000 tons per year commencing after 1961 (about 5 years after commencement of the term of the contract). It is probable that this contemplated that all 6 units at Gannon would use coal: *viz.*, 2,250,000 tons for 6 units equals 375,000 tons per unit; compare this with the minimum guarantee of 225,000 tons for each of the first two units, and actual 1960 requirements for both of 700,000 tons, or 350,000 tons per unit.

ditional plants and competing steel suppliers would be able to compete for the custom of those plants. The result would be the practical elimination of Section 3 of the Clayton Act as an instrument of effectuating the national policy of assuring "freedom to buy . . . in an open competitive market," and " freedom to sell". *Klor's Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213 (1959).

In any event, this Court has rejected the proposition advanced by petitioner. In *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U.S. 346 (1922), this Court considered a contract under Section 3 of the Clayton Act requiring the buyer to purchase from the seller his total requirements of goods bought for resale at the buyer's existing "premises". The defense was made that this contract did not exclude competitors because goods might be bought elsewhere for resale at other "premises." This Court rejected the argument, as follows (258 U.S. at 354-355):

> ". . . It is idle to say that the covenant was limited to the premises of the purchaser, and that sales might be made by it elsewhere. The contract should have a reasonable construction. The purchaser kept a retail store in Boston. It was not contemplated that it would make sales elsewhere. . . ."

Indeed, this Court has held that a contract committing the buyer to a single seller may foreclose competition within the prohibition of Section 3 even if the buyer could in fact avoid its provisions by dealing with others. In *International Salt Co.* v. *United States*, 332 U.S. 392 (1947), lessees of defendant's salt machines entered into contracts to buy all salt used in the machines exclusively from the defendant. Satis-

factory competing machines were available, and the lessee was free to obtain such machines and to buy salt to be used in them from defendant's competitors. This Court nevertheless held that the agreement to buy from the defendant all salt to be used in defendant's machines violated Section 3. As the Court stated in *Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1, 10, n. 8 (1958):

> "As a matter of fact the defendant in International Salt offered to prove that competitive salt machines were readily available which were satisfactory substitutes for its machines (a fact the Government did not controvert), but the Court regarded such proof as irrelevant."[8]

This feature of *International Salt* was not novel. It is a common feature of the tying cases that the buyer is able to escape the restriction or does in fact deal with competing suppliers. See, *e.g.*, *International Business Machines Corp.* v. *United States*, 298 U.S. 131 (1936); *Signode Steel Strapping Co.* v. *Federal Trade Commission*, 132 F. 2d 48, 52 (4th Cir. 1942); *Judson L. Thomson Mfg. Co.* v. *Federal Trade Commission*, 150 F. 2d 952 (1st Cir. 1945), *cert. denied*, 326 U.S. 776 (1945); *Osborn* v. *Sinclair Refining Company*, —— F. 2d —— (4th Cir. 1960), reported in CCH Trade Regulation Reporter, Current Cases, ¶ 69,771. There was proof in the latter three cases that buyers were actually using machines or products, or both, competitive with those supplied under the outlawed tying agreements.

The principle of these cases is applicable to requirements contracts. This Court has held in *Standard*

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[8] See also the reference to *International Salt* in *Standard Oil Co. of California* v. *United States*, 337 U.S. 293, 305 (1949).

Oil Co. of California, supra, that no distinction is to be drawn in the tests to be applied under Section 3 between tying and requirements cases.[9] The statutory inquiry in both cases is the same: is there an arrangement—whether in the form of a tying agreement or a requirements contract—"on the condition, agreement, or understanding that the lessee or purchaser . . . shall not use or deal in the goods . . . of a competitor or competitors of the seller."

In the present case there is no room for debate as to whether the statutory requirement is satisfied. The facts are that the contract covers seller's total needs for coal and that the exclusion of competitors of the seller in the coal business is unqualified. The buyer does not use coal from any other source; it has no facilities for using coal except under the contract. It is idle for petitioner to urge this Court to read Section 3 so as to exclude the present contract.

Indeed, not only is this a "total" requirements contract; it is also an engrossment of the prescribed mar-

[9] In *Standard Oil Co. of California, supra*, this Court considered at length whether "a distinction is to be drawn for purposes of the applicability of § 3 between requirements contracts and contracts tying the sale of a non-patented to a patented product" (337 U.S. at 305). But it concluded that a distinction in the "tests" would lead to "serious difficulties" (337 U.S. at 308), and "would . . . stultify the force of Congress' declaration that requirements contracts are to be prohibited wherever their effect 'may be' to substantially lessen competition" (337 U.S. at 313).

It should be noted that the economic effect of a requirements contract on competition is even more pronounced than a tie-in contract. The ordinary tie-in agreement leaves room for the buyer to escape his commitment to the seller by using other equipment. It leaves room for other sellers to overcome the commitment by providing different equipment. Realistically, the requirements contract leaves no way for the buyer or competing sellers to overcome the exclusionary arrangement.

ket and an exclusion of all competitors for a period of years which in itself is a "competition-killer".[10] This is a 20 year non-cancellable contract. A term in excess of one year has been condemned as excessive in requirements contract cases arising under both the Sherman Act and Section 3 of the Clayton Act. *Federal Trade Commission* v. *Motion Picture Advertising Service Co.*, 344 U.S. 392, 395-397 (1953); *United States* v. *Linde Air Products Co.*, 83 F. Supp. 978, 982 (N.D. Ill. 1949); *United States* v. *American Can Co.*, 87 F. Supp. 18, 31 (N.D. Cal. 1949). The term of the outlawed contract in *Standard Fashion Co.* v. *Magrane-Houston Co., supra,* was only two years (258 U.S. at 351-352). Most of the contracts in *Standard of California, supra,* were binding for only six months (337 U.S. at 296).

In an attempt to establish that Section 3 does not cover the present contract, petitioner advances a number of other arguments designed to re-cut the cloth of Section 3 to fit its needs.

First, it essays the suggestion that Section 3 does not apply to a contract to supply "the requirements of a single consumer" (PB 20). The short answer is that the statute is expressly phrased in the singular. It prohibits "*a* sale or contract for sale . . . on the condition, agreement or understanding that the *lessee*

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[10] As was said of 25-year contracts in *United States* v. *Pullman Co., supra,* 50 F. Supp at 129:

> "As a competition killer the long term contract is an effective weapon. . . . Even a patentee is not so secure against the passage of time."

or *purchaser* . . . shall not use or deal in the goods of a competitor or competitors of the *lessor* or *seller* . . . ."[11]

Second, it is perfectly clear that Section 3 is not confined, as petitioner elaborately argues, to sales for resale. It expressly applies to a lease or sale "for *use, consumption or resale*". Indeed, most of the cases in which Section 3 has been applied relate to commodities used in manufacturing processes.[12]

Third, petitioner claims that the present contract, despite its terms and scope, should be regarded as "a contract for a fixed amount" and therefore outside the reach of Section 3 (PB 16). The fact of the matter is that the contract is avowedly for "total requirements", whatever their volume. In the words of the Complaint, it is "a contract providing for the sale and delivery . . . of *all* of the coal required by plain-

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[11] The Report of the Attorney General's Antitrust Committee recognizes that there are circumstances in which Section 3 applies to a single contract with a single customer in a single local market. In its words, "the industry's characteristic retailing structure may not enable more than one outlet in a particular consuming area, so that an exclusive arrangement which ties up any single customer shuts off a significant local market." (Report of the Attorney General's National Committee to Study the Antitrust Laws, p. 147).

[12] See, e.g., *International Salt Co.* v. *United States*, 332 U.S. 392 (1947); *United Shoe Machinery Corp* v. *United States*, 258 U.S. 451 (1922); *Pennsylvania Water & Power Co.* v. *Consolidated Gas, Electric Light & Power Co.*, 184 F.2d 552, 559 (4th Cir. 1950), *cert. denied*, 340 U.S. 906 (1950); *Judson L. Thomson Mfg. Co.* v. *Federal Trade Commission*, 150 F.2d 952 (1st Cir. 1945), *cert. denied*, 326 U.S. 776 (1945); *Oxford Varnish Corp.* v. *Ault & Wiborg Corp.*, 83 F.2d 764 (6th Cir. 1936); *Signode Steel Strapping Co.* v. *Federal Trade Commission*, 132 F.2d 48 (4th Cir. 1942).

tiff for the production of electric energy at a new plant . . . for a period of 20 years . . ." (R. 5).[13]

The contract at issue is, therefore, a requirements contract, and not some other type of arrangement, and it is the actual contract made by the parties that is before the Court. Even if—which is not the case—the parties had considered an alternative contract, the Court would base its decision upon the realities and the actualities of the contract executed by the parties. In *United Shoe Machinery Corp.* v. *United States*, 258 U.S. 451 (1922), it was urged that Section 3 did not apply to the challenged leases "because the parties were offered an alternative lease alleged to be free from objectionable conditions complained of" (258 U.S. at 464). The Court answered that the issue was to be decided on the basis of the provisions in the agreements before it.[14]

Petitioner suggests, however, that despite its plain language, the present contract should be considered a contract for a fixed amount of coal because the quantities that it requires "can easily be translated into an approximate number of tons. . . ." (PB 18). This would be of no consequence, even if it were established, because whether it is easy or difficult to translate the needs of the units into tons, the fact is that

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[13] The facts of this case preclude reliance on *Federal Trade Commission* v. *Sinclair Refining Co.*, 261 U.S. 463 (1923). In *Sinclair* the buyer was simply required to use Sinclair pumps *if* he elected to sell Sinclair gasoline. The Court emphasized that the buyer was free "*to buy wherever he chooses*" and to "discontinue" dealings with Sinclair at his election (261 U.S. at 474).

[14] As the Court put it (*ibid.*):

> "the fact that a form of lease was offered which is not the subject of controversy is not a justification of the use of clauses in other leases which we found to be violative of the act."

the contract preempts not a specified amount, but the "total requirements".

The facts, moreover, show the complete lack of substance in petitioner's argument. In the first place, the contract is open-end. It guarantees purchase of 450,000 tons per year. It then commits the buyer to purchase all additional "fuel requirements" for its Gannon Station, whatever they may be, needed to supply the actual needs of the first two units and all other coal-burning units built at Gannon during the first ten years of the contract period.[15] The quantities were actually much greater than the minimum guarantee.

This is not a contract for a fixed amount which permits competition for the buyer's needs in excess thereof. It is a contract for the buyer's total requirements for all of its existing and planned needs. No area remains in which other coal producers may compete for access to this huge segment of commerce. As the Court of Appeals found in this case, the requirements contract " 'effectively foreclose[s] whatever opportunity there might be for competing suppliers to attract his patronage' " (276 F. 2d at 771; R. 70). Accordingly, there can be no doubt that it comes within the category of contracts to which Section 3 applies.

2. Petitioner's use of oil in other facilities is irrelevant, since coal itself is a "line of commerce."

Petitioner attempts to remove the present contract from the scope of Section 3 by reference to its use of oil in facilities not covered by the contract. This is entirely irrelevant.

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[15] Petitioner gets no benefit from *Board of Trade of Chicago* v. *United States*, 246 U.S. 231 (1918), cited at PB 19. The doctrine of this case was held immaterial under Section 3 in *Standard Oil of Calif.*, *supra* (337 U.S. at 313).

The issue here is the elimination for 20 years of competing suppliers of coal. Coal is a separate and distinct "line of commerce". Section 3 forbids the foreclosure of *"a* competitor or competitors of the lessor or seller . . . *in any line of commerce."* In construing the identical language of Section 2 of the Clayton Act, this Court ruled (*George Van Camp & Sons Co.* v. *American Can Co.*, 278 U.S. 245, 253 (1929)):

> "The phrase is comprehensive, and means that if the forbidden effect or tendency is produced in *one* out of *all* the various lines of commerce, the words 'in any line of commerce' literally are satisfied. . . . The words being clear, they are decisive. There is nothing to construe." (Emphasis in original).

The phrase "line of commerce" reaches any class of goods with "sufficient peculiar characteristics and uses" to distinguish it from kindred products. *United States* v. *E. I. duPont de Nemours & Co.*, 353 U.S. 586, 593-594 (1957); see also *United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576, 595 (S.D. N.Y. 1958).

To paraphrase the Court in the *Van Camp* and *duPont* cases, coal is *"one* out of *all* the various lines of commerce" and it has "sufficient peculiar characteristics and uses" to distinguish it from oil. The two fuels cannot be burned in the same equipment. They require different handling and storage equipment. The peculiarly distinctive nature of the soft coal industry has been recognized by this Court and by Congress. *Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344 (1933); *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381 (1940).

In any event, discussion concerning oil has no bearing in the present case. By reason of this contract,

petitioner is *not* free to substitute oil for coal, even if this could be done as a practical matter. Under this contract, petitioner is committed to use coal in all of the facilities which come under the contract, and to take that coal under the contract for 20 years. The contract commits the petitioner to take under its terms "the total requirements of *fuel*" for the first two units, and for any additional units constructed in the stated 10 year period to use coal as fuel. Petitioner cannot buy any part of its requirements from another coal producer, nor—even if it were feasible—could it, under the contract, convert those units to burn oil and obtain oil from other suppliers at any time within the 20 year period of the contract. Accordingly, reference to the possibility of competition between coal and oil is totally groundless so far as the requirements of the committed units is concerned.[16]

If the governing legal principle prevented application of Section 3 to contracts covering a particular commodity because of the existence of competing products, Section 3 would be inapplicable to many situations of critical importance in our economy. For example, if General Motors made a contract with a single supplier for its total requirements of steel, for 20 years, it

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[16] By the same token, there is no substance in the claim that the contract is not illegal because it reserves to the buyer the right to reduce the quantities of coal by 15% in order to use "some by-product as a fuel which would be supplied by some local customer of the Buyer" (R. 8; PB 14). There is no claim or evidence that this was ever contemplated or that such by-product fuel was available. In addition, the "by-product" would not be coal. Hence the contract would still foreclose completely the competitive opportunities of other coal suppliers for 20 years.

could be argued that since steel is competitive with aluminum, the contract is not within the scope of Section 3. If Campbell Soup made a 20 year contract with American Can for its total requirements of cans, Section 3 would not apply because glass and plastics—and perhaps paper—are competitive with cans. Neither Section 3, nor any other provision of the Clayton Act using the phrase "line of commerce",[17] is susceptible of this destructive interpretation.

Petitioner also urges the relevance of the *Cellophane* case's standard of interchangeability (PB 15, n. 3). *United States* v. *E. I. duPont de Nemours & Co.*, 351 U.S. 377, 400 (1956). But that case proves our point. It carefully distinguishes between "interindustry competition" and competition within the same industry, and it points out that:

> "one can think of building materials as in commodity competition but one could hardly say that brick competed with steel or wood or cement or stone in the meaning of Sherman Act litigation: the products are too different" (351 U.S. at 393).

Obviously the same is true of oil and coal; and certainly they are not interchangeable in the facilities of petitioner that are preempted by this contract.

Further, the issue in *Cellophane* was whether duPont possessed monopoly power in the total market place. The present question is whether, under the particularized standards of Section 3 of the Clayton Act, the agreement eliminates the competition "of a competitor or competitors of the seller" of coal "where the effect

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[17] See Section 7 relating to mergers (15 U.S.C. § 18) and Section 2(a) relating to price discriminations (15 U.S.C. § 13(a).

. . . may be to substantially lessen competition in any line of commerce".

The *Cellophane* case did not involve a particularized act or agreement or course of conduct. The question was the existence of monopoly power violating Section 2 of the Sherman Act in the absence of evidence of any "alleged attempt to monopolize or conspiracy to monopolize" (351 U.S. at 379).

The Court was careful to stress the distinction even for purposes of Section 2 between a case of monopoly power and cases involving specific conduct which suppresses competition. It said (351 U.S. at 395):

> "Illegal monopolies under § 2 may well exist over *limited products in narrow fields where competition is eliminated.* That does not settle the issue here."

As instances in which Section 2 "had been extended to producers of single products and to businesses of limited scope", the Court cited "dissemination of news in a community and surrounding territory" and "Women's dresses of 'original design'" (*id.* at 395, note 23).

In the present case, the issue is extremely narrow. The question is simply whether the particular agreement eliminates competition by a competitor or competitors of the seller—in any line of commerce. In that context, the scope of the inquiry is properly confined to "limited products in narrow fields" (*duPont, supra*).

Accordingly, the broad economic interplay of varieties of products is not relevant to Section 3, and specifically, the general interaction in the market place

of other commodities involved is beside the point. We are not here considering whether the parties were able to dominate the market or to fix prices or control output. We are considering a specific contract for a specific commodity that violates a specific prohibition of the law.

As this Court said in *Standard Oil Co. of California, supra*, "To insist upon such an investigation [of the same broad economic scope permitted by the Sherman Act] would be to stultify the force of Congress' declaration that requirements contracts are to be prohibited wherever their effect 'may be' to substantially lessen competition" (337 U.S. at 313). As the Court further said in that case: "We are dealing here with a particular form of agreement specified by § 3 and not with different arrangements" (337 U.S. at 311).

The Court has thus emphasized that the practices which Section 3 outlaws are, by Congressional definition, anti-competitive: the elimination of a competitor or competitors in any line of commerce involving a substantial amount of commerce. Its prohibitions are specific and incisive: They extend to "*a* sale or contract" —to the foreclosure of "a competitor . . . of *the seller*".

On this record there is no doubt of the actual foreclosure of a host of sellers of coal other than the contracting party.

It is conceded that there are 700 qualified sellers "not only able but 'eage.' to sell coal to petitioner" (PB 6). Petitioner's president testified as follows (R. 62):

> "We have coal companies in and out of our office so fast that the receptionist doesn't know where to seat them to give them time to talk to people."

* * *

> "We have received innumerable offers of coal at various prices per ton. I couldn't possibly sit here and remember which price of coal per ton related to the BTU's per pound or any number of such things."

This case is accordingly governed by the following doctrine of *International Salt Co.* v. *United States, supra,* 332 U.S. 392, 398:

> "If others cannot produce salt equal to reasonable specifications for machine use, it is one thing; but it is admitted that, at times, at least, competitors do offer such a product. They are, however, shut out of the market by a provision that limits it, not in terms of quality, but in terms of a particular vendor."

In *Standard of California, supra,* the Court held that "there was no conclusive proof" that the requirements contracts "actually reduced competition", but this was held immaterial because Congress had "authoritatively" condemned such contracts as "detrimental" if they merely created "a potential clog" on a "substantial amount of competitive activity" (337 U.S. at 310, 311, 314). In this case there is an actual, not merely a "potential", clog on competition, and the clog suppresses a highly "substantial amount of competitive activity".

3. The contract violates the qualifying or "substantiality" clause of Section 3

There can be no doubt that the effect of the present contract "may be to substantially lessen competition or tend to create a monopoly" (38 Stat. 731, 15 U.S.C. §14). For the 20 year life of the contract, the contract seller is exclusively granted all of the business of any

coal-burning unit installed at the contract plant during the first 10 years of the contract term.

The amount of commerce and the 20 year duration of the contract in the present case far exceed the magnitude of the commerce involved in any Section 3 case heretofore adjudicated.

The present contract provides for a *minimum* annual purchase of 450,000 tons, at a minimum contract price of $6.40 per ton (R. 9-10). On an annual basis, this *minimum* preempts commerce in coal approximating $2,900,000. For the 20 year period, it commits to a single buyer and seller, a volume of $58,000,000.

The *actual* requirements engrossed by the contract are far greater. Petitioner's own estimates of the actual requirements of its coal plant appear in the substitute Love & Amos contract (PB 5; R. 27). They are 700,000 tons in 1959 and 1960; 1,000,000 tons annually beginning next year; and, ultimately, "2,250,000 tons per year" (*ibid.*). At the 1961 level of 1,000,000 tons, and the minimum contract price of $6.40 per ton, the preemption is $6,400,000 annually or $128,000,000 over the 20 year contract term.

For an irreducible period of 20 years, the contract eliminates any possibility of competition for coal business which in 1959 alone equalled the prior 700,000 ton consumption of coal in Peninsular Florida (R. 67). The petitioner itself estimated that within a very few years its requirements under the contract would exceed those of the balance of the entire State of Florida (PB 6).

By 1961, without reference to the subsequent increases, petitioner's coal requirements of 1,000,000 tons,

committed to this contract will exceed in fuel equivalent the combined requirements of all of petitioner's oil-burning plants (825,000 tons). (R. 31-32).

When the magnitude of the engrossment effected by this contract is compared with the standard established by this Court, there can be no debate as to the unlawful effect of the contract. In *International Salt*, where the tying contracts preempted only $500,000 of business annually (332 U.S. 395), this Court held that:

> "The volume of business affected by these contracts cannot be said to be insignificant or insubstantial and the tendency of the arrangement to accomplishment of monopoly seems obvious" (332 U.S. 396).

In *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594 (1953), the Court confirmed the rule that evidence of the restraint of "a substantial volume of commerce" alone condemns a contract subject to Section 3 (345 U.S. at 608-609 (1953)).

The lower courts have adopted the same standard. In *Anchor Serum Co.* v. *Federal Trade Commission*, 217 F. 2d 867, 873 (7th Cir. 1954) the court held that "the volume of business was substantial", for purposes of Section 3, with respect to requirements contracts preempting sales of "one-half million dollars per year". In *Oxford Varnish Corp.* v. *Ault & Wiborg Corp.*, 83 F. 2d 764, 766 (6th Cir. 1936), only $325,000 worth of annual business, in a $66,000,000 dollar industry, was captured by the contracts invalidated under Section 3.

Further, the period of engrossment in the present case is unexampled. In *Standard Oil of California*, for example, most of the contracts were binding for only a six-month period (337 U.S. at 295-296, 305).

In *Standard,* the Court carefully analyzed the showing that had to be made as to the effect of requirements contracts. It pointed out that the purpose of Section 3 was to set up a "specific prohibition" of a practice thought to be beyond the reach of the Sherman Act (337 U.S. at 311). It noted that the bill originally contained no qualifying clause concerning the effect of the prohibited contracts, and it concluded that when the qualifying clause was added to the bill which became Section 3, there was no "intention seriously to augment the burden of proof" (337 U.S. at 312). It quoted one of the Senate conferees for the proposition "that even the elimination of competition in a single town would substantially lessen competition" (337 U.S. at 312, n. 15).

The facts of this case, then, measured by the statute and the decisions of this Court, are decisive that the engrossment is substantial. Petitioner, however, ignores both statute and controlling precedents. It seeks to avoid the conclusive effect of the enormous volume of coal, dollar amounts and period of years involved in the present contract by measuring the pre-empted volume, not in terms of its own significance or even of the coal market in Florida.[18] Instead, petitioner uses the total production of all coal producers in the 9 principal coal producing states in the country, including Kentucky, West Virginia, Pennsylvania, Illinois and Ohio, among others. (PB 39-42, n. 24).

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[18] The Bureau of Mines publishes figures for coal consumption in the entire states of Georgia and Florida combined. Even on this basis, the 1959 requirements under this contract, 700,000 tons, are 18% of the total for both states. The eventual 2,250,000 tons would undoubtedly be a far greater percentage in the relevant years. See *United States Department of Interior, Bureau of Mines, Mineral Market Report, M.M.S. No. 3035,* p. 23.

Petitioner's method is fallacious. The market involved is not the entire nation and foreign countries to which these producers sell their coal. It is the market in which this preclusive contract operates and from which it excludes "a competitor or competitors of . . . the seller". This is evident from *Standard Oil of California, supra.* It made no mention whatever of the overall production of refiners serving, among other areas, the "Western area" (337 U.S. at 295). The market percentage there mentioned was the ratio of the sales preempted by the requirements contracts to total sales in the relevant area. That percentage was only 6.7% (337 U.S. at 295, 305). This compares with the present contract's 1959 preemption of 18% of the coal sold by all suppliers in Florida and Georgia. See note 18, p. 35, *supra.*[19]

To sum up: The contract which petitioner would enforce clearly effects a substantial "lessening" of competition within the meaning of Section 3. This is so whether the "quantitative substantiality test" is applied (*Standard of California,* 337 U.S. at 298) or whether a percentage of the "relevant market" is considered. Under either standard there is a forbidden preemption which actually excludes competitors from a substantial market for an unreasonably long period of 20 years.

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[19] When the Department of Interior fixed minimum prices for bituminous coal, under the Bituminous Coal Act of 1937, "Common Consuming Market Areas" had to be established for that purpose (50 Stat. 79). The market area in which petitioner's utility is located was No. 126. It embraced Peninsular Florida and part of Georgia. See *Examiners' Proposed Findings of Fact, Conclusions of Law, General Docket No. 15, Bituminous Coal Division, United States Department of Interior, Appendix B, pp. 50-51; Vol. 126, Record of Proceedings of Docket No. 15, National Archives, Exhibit No. P-406.*

4. The application of Section 3 is not restricted to situations in which the seller is dominant or possesses economic leverage to compel the buyer to enter into the preclusive arrangement.

Petitioner predicates much of its argument on the premise that Section 3 prohibits a contract only where the seller has market dominance or economic leverage over the buyer. This Court has held the precise contrary of that proposition.

In *Standard of California, supra,* the Court expressly recognized that the seller did not have a dominant position in the market.[20] It nevertheless applied Section 3 to Standard's requirements contracts with its dealers. The Court also carefully analyzed the possibility of requiring that the application of Section 3 to requirements contracts be based upon the seller's "degree of market . . . dominance". It rejected the test. 337 U.S. at 307-308.[21]

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[20] The Court said ". . . Standard's share of the retail market for gasoline . . . is hardly large enough to conclude as a matter of law that it occupies a dominant position, nor did the trial court so find" (337 U.S. at 302). At p. 309, the Court also said "We assume further that the duration of the contracts is not excessive and that Standard does not by itself dominate the market."

[21] Petitioner quotes the dissenting opinion in *Federal Trade Commission* v. *Motion Picture Advertising Service Co.*, 344 U.S. 392, 402 (1953), in an effort to show that *Standard Oil* recognized that the dealers might make "exclusive contracts" (PB 56). But the passage quoted from the dissent obviously means that dealers can make such contracts provided that they remain free to deal with others if they so desire. The quoted passage refers to p. 314 of the opinion in *Standard Oil* which states (337 U.S. at 314):

> ". . . if in fact it is important for retail dealers to assure the supply of their requirements by obtaining the commitment of a single supplier to fulfill them, *competition for their patronage* should enable them to insist upon such an arrangement, *without binding them to refrain from looking elsewhere.*"

Subsequently, in *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594 (1953), the Court again considered the point. It distinguished the requirements of Section 1 of the Sherman Act from the precise and definite provisions of Section 3 of the Clayton Act. As to the Clayton Act, it expressly held that Section 3 is violated "[w]hen the seller enjoys a monopolistic position in the market for the 'tying' product, *or* if a substantial volume of commerce in the tied product is restrained" (345 U.S. at 608-609). It is important to note that the Court's opinion itself italicizes the word "or", indicating its emphasis upon the disjunctive.[22]

In *Times-Picayune*, which petitioner ignores, it was emphasized that only as to Section 1 of the Sherman Act is there a dual requirement of the seller's "monopolistic position" *and* the restraint of a "substantial volume of commerce". Consequently, petitioner gains no support from its citation of *Northern Pacific* as authority for the argument that the contract is not illegal because the seller had no "economic leverage" (PB 33). The *Northern Pacific* case arose only under Section 1 of the Sherman Act (356 U.S. at 3-4). It involved no Section 3 issue.[23]

Section 3, by specific provisions, makes unlawful the prescribed category of contracts subject only to a

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[22] The dissent in the *Northern Pacific* case, 356 U.S. 1, 14, n. 2 (1958), also noted this Section 3 criterion in *Times-Picayune*.

[23] Additionally, the *Northern Pacific* passage quoted by petitioner is not comparable on the facts. It refers to the terms of sale of daily food purchases for household use. This is not analogous to a requirements contract foreclosing all competition for the business of the largest industrial buyer in the community for a period of twenty years.

showing that the effect of the sale or of the condition eliminating a competitor or competitors "may be to substantially lessen competition or tend to create a monopoly in any line of commerce." It makes no distinction between situations on the basis of "dominance" of sellers or buyers; it contains no requirement that the unlawful contract must have been imposed on one of the parties by the other. This Court has made it clear that it will not import additional requirements into the application of Section 3.[24] It has insisted, in connection with the specific and detailed provisions of the Clayton Act, that the Court "cannot supply what Congress has studiously omitted." *Federal Trade Commission* v. *Simplicity Pattern Co.* (a Section 2 case), 360 U.S. 55, 67 (1960).

As a practical matter, Section 3 could not be limited to situations where the seller has dominance, or leverage, or superior bargaining power without frustrating its purposes and inviting a host of preclusive arrangements. In our economy, it is frequently the buyer that has superior economic power. For example, General Motors might buy its automobile radios from a single, relatively weak supplier. If this were done on a 20-year requirements contract, can there be any doubt that it should and would be condemned by Section 3? The Great Atlantic & Pacific Tea Co. might contract to buy its total requirements of canned peaches for 20 years, from a single, relatively small producer to the exclusion of that producer's competitors. Certainly, such an arrangement would violate Section 3.

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[24] See *Standard of California*, *supra*, 337 U.S. at 313.

In either case, the effect of the agreement would be, in the language of Section 3, that "the purchaser thereof shall not . . . deal in the goods . . . of a competitor or competitors of the . . . seller."

From a competitive standpoint it does not matter whether the preemptive agreement is imposed by the seller or the buyer, or whether it is voluntarily negotiated between parties of equal strength. Whatever the impetus, "observance by [the buyer] of his requirements contract with [the seller] does effectively foreclose whatever opportunity there might be for competing suppliers to attract his patronage" (*Standard Oil Co. of California, supra,* 337 U.S. at 314).

If a seller's "leverage" limitation were read into Section 3, the statute would have little or no application to the soft coal industry, and coal producers would, *pro tanto,* be at the mercy of large users who could at any time, in effect, make captives of their suppliers. It is a chronically depressed industry in which buyers historically dominate sellers. This Court long ago recognized that excess productive capacity made " 'the market for coal a buyers' market for many years past' " (*Appalachian Coals, Inc.* v. *United States,* 288 U.S. 344, 364 (1933)). This condition impelled the passage of the Bituminous Coal Acts of 1935 and 1937. See *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U.S. 381, 395 (1940); H. Rep. No. 1800, 74th Cong. 1st Sess., pp. 1-2; S. Rep. No. 470, 74th Cong., 1st Sess., p. 2; S. Rep. No. 252, 75th Cong., 1st Sess., p. 2.

The same condition persists today. The industry is described as "economically ill" in a 1960 Congressional report which recommended legislation—enacted

as P.L. 86-599, 86th Cong., 2d Sess.—to promote the development of new uses for coal. H. Rep. No. 1241, 86th Cong., 2d Sess., p. 7. Petitioner describes coal as "one of the most competitive products in the country" (PB 40). It agrees that when it made the contract with respondents' predecessor, "the seller was faced with intense competition in the depressed coal industry" (*ibid.*, note 21).

Beyond this the economic leverage concept would seriously encumber the administration of Section 3. To demand evidence of the parties' comparative economic strength "would be a standard of proof if not virtually impossible to meet, at least most ill-suited for ascertainment by courts" (*Standard Oil Co. of California, supra*, 337 U.S. at 310).

5. Petitioner's attempted economic justifications are irrelevant.

This Court has held, in its comprehensive opinion in *Standard of California*, that Section 3 is "a narrowly directed statutory provision" subject only to the "broadly phrased qualification" requiring a showing that the effect of the prohibited agreement or of the exclusion of competition "may be to substantially lessen competition . . . in any line of commerce" (337 U.S. at 312). The Court exhaustively reviewed many possible benefits of requirements contracts, but held that the "Congress has authoritatively determined that those practices are detrimental where their effect may be to lessen competition" and that "[i]t has not left at large for determination in each case the ultimate demands of the 'public interest' " (337 U.S. at 311).

Nevertheless, petitioner urges that consideration be given to the alleged fact that the contract was "eco-

nomically necessary to both buyer and seller", and to the circumstance that the contract "created competition" with the oil industry in Peninsular Florida (PB 38, 43-47). Petitioner also states that both the buyer and seller made substantial investments in facilities to ship and receive the coal (PB 42).

It is clear that the contract was not necessary to enable the petitioners to obtain its coal requirements. As we have previously noted, petitioner admits that there are over 700 coal producers which produce coal suitable for its requirements; and according to the graphic statement of petitioner's president, petitioner received "innumerable offers of coal at various prices per ton". See pp. 31-32, *supra*. The lack of necessity in the present case for a 20 year requirements contract is further evident from petitioner's replacement contract with Love & Amos Coal Company. As already noted, this expressly provides: "Cancellable on 12 months notice by supplier or purchaser" (R. 27).

Similarly, there is no basis for relating the construction of facilities for handling and utilizing coal to this particular unlawful contract. Those facilities could equally be used under a lawful contract, and petitioner is apparently having no difficulty in using its facilities.

In any event, this type of economic justification is of no avail under Section 3, as this Court has held. In *Standard Oil Co. of California*, this Court expressly reviewed each of the possible economic justifications of requirements contracts, and held that, in view of the explicit prohibitions in Section 3, they would not exonerate the contracts. One of the specific considerations reviewed and rejected was "in the case of the buyer,

they may assure supply, afford protection against rises in price [and] enable long term planning." In the case of sellers, the Court pointed out and rejected the importance of "a predictable market" "of particular advantage to a newcomer to the field to whom it is important to know what capital expenditures are justified" (337 U.S. at 306-307). Such considerations cannot override the public-policy mandate of Section 3, even if the value of the investments is in fact impaired by the invalidation of the contract. Cf. *Continental Life Ins. Co.* v. *United States*, 259 U.S. 156, 171 (1922).

More broadly in *Standard Oil Co. of California, supra,* the Court reviewed, but rejected as irrelevant, all of the various economic considerations pressed by petitioner here. In discussing the possible advantages of requirements contracts, it said (337 U.S. at 306-307):

> "Requirements contracts, on the other hand, may well be of economic advantage to buyers as well as to sellers, and thus indirectly of advantage to the consuming public. In the case of the buyer, they may assure supply, afford protection against rises in price, enable long-term planning on the basis of known costs, and obviate the expense and risk of storage in the quantity necessary for a commodity having a fluctuating demand. From the seller's point of view, requirements contracts may make possible the substantial reduction of selling expenses, give protection against price fluctutations, and—of particular advantage to a newcomer to the field to whom it is important to know what capital expenditures are justified—offer the possibility of a predictable market. See Stockhausen, The Commercial and Anti-Trust Aspects of Term Requirements Contract, 23 N.Y.U.L.Q. Rev. 413, 413-14 (1948). They may be useful, moreover, to a seller trying to establish a foothold against the counterattacks of entrenched

> competitors. See id. at 424 et seq.; Excelsior Motor Mfg. & Supply Co. v. Sound Equipment, Inc., 7 Cir., 73 F. 2d 725, 728; General Talking Pictures Corp. v. American Tel. & Tel. Co., D.C. Del., 18 F. Supp. 650-666. . . ."[25]

The Court held that all such considerations were immaterial because Congress had determined the economic policy questions by its enactment of Section 3. (337 U.S. at 311; see quotation at p. 41, *supra*).

Similarly, it would not matter, if it were true, that the contract had the "economic" benefit of inducing the reduction of oil prices in Florida. In *Standard Oil Co. of California, supra*, the Court noted that the use of requirements contracts tends to freeze out competition and answered, as follows, the claim that they lowered costs (337 U.S. at 309):

> ". . . If, indeed, this were a result of the system, it would seem unimportant that a short-run by-product of stability may have been greater efficiency and lower costs, for it is the theory of the antitrust laws that the long-run advantage of the community depends upon the removal of restraints upon competition. . . ."[26]

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[25] By its express citation of the case as supporting this rejected consideration, the *Standard* decision implicitly overruled *Excelsior Motor Mfg. & Supply Co. v. Sound Equipment, Inc.*, 73 F. 2d 725 (7th Cir. 1934), *cert. denied*, 294 U.S. 706 (1935), cited by petitioner at page 46 of its Brief.

[26] *Cf. Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 213 (1951), in which the Court held that restraints of competition cannot be justified even if their purpose is to reduce prices.

Petitioner refers at length to cases arising under the Natural Gas Act (PB 44-46, 48-51). It admits that these cases deal with a regulated public utility and that they do not involve the antitrust laws or Section 3 of the Clayton Act (PB 49). Petitioner says they are cited primarily "as illustrative of the economic background and necessity" of a contract like the present (*ibid.*). But they are not material here.

In the case of the natural gas industry and certain other segments of our economy, Congress has determined that regulation of rates and facilities is the appropriate course. In the case of coal and most of our economy, our national policy is based on the premise that our economic, political and social welfare are best served by keeping "the channels of competition free so that prices and services are determined by the workings of a free market."[27] *Cf. McLean Trucking Co.* v.

[27] This quotation is part of the following apt analysis of the Court of Appeals for the District of Columbia Circuit in *Pennsylvania Water & Power Co.* v. *Federal Power Commission*, 193 F. 2d 230, 234 (D.C. Cir. 1951), *affirmed*, 343 U.S. 414 (1952):

> ". . . The Sherman Act, 15 U.S.C.A. §§ 1-7, 15 note, and related laws represent an attempt to keep the channels of competition free so that prices and services are determined by the workings of a free market. They derive from the conviction that the greatest good to the greatest number will be attained by preventing monopoly, monopolizing and combinations in restraint of trade. In marked contrast is a statute such as Part II of the Federal Power Act. It evidences congressional recognition that competition can assure protection of the public interest only in an industrial setting which is conducive to a free market and can have no place in industries which are monopolies because of public grant, the exigencies of nature, or legislative preference for a particular way of doing business. In place of competition as a generalized and indirect regulator of prices and services in the field of interstate transmission of electric energy at wholesale, Congress has substituted a regulatory agency authorized to supervise almost every phase of the regulated company's business."

United States, 321 U.S. 67, 83-86 (1944); *United States v. Radio Corporation of America*, 358 U.S. 334, 350-351 (1959).

Petitioner is a public utility, but its exemption from the normal rules of competition is limited. It does not extend to the entire market place, as some of petitioner's comments seem to propose. If it should buy natural gas, it would be dealing in a market regulated by statute and the Federal Power Commission. The permissible rates, the terms of the contract, its duration and its exclusivity would be fixed by rules based in large part upon considerations designed to promote "the financial integrity of the [natural gas] enterprise"; upon conservation considerations; upon assuring a fair "return of equity", etc. *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944); *Federal Power Commission v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 506 (1949).

But when petitioner enters the coal market, it is purchasing an unregulated commodity to which Congress has applied the rules of competition under the antitrust laws. Congress abandoned its brief experiment with a regulatory system, including price-fixing, in the coal industry when it permitted the Bituminous Coal Act of 1937 to lapse in 1943. See 15 U.S.C. (1946 ed.) §§ 828-849 and codification note.

The very gas cases cited by petitioner illustrate the subordination of competitive standards to rate-making criteria in a regulated industry. In the *Houston* case the deletion of cancellation clauses from the 20 year contracts was ordered on the precise ground that rate-making factors overrode competitive considerations. See *Matter of Houston Texas Gas and Oil Corp.*, 16 F.P.C. 110, 132, 136 (1956), *affirmed sub nom.*

Florida Economic Advisory Council v. *Federal Power Commission*, 251 F. 2d 643 (D.C. Cir. 1957), *cert. denied*, 356 U.S. 959 (1958). The same economic criteria ruled irrelevant in *Standard Oil Co. of California*, pp. 41-44, *supra*, were held controlling not only in the *Houston* case, but also in the other regulatory cases cited by petitioner (PB 48-49), namely, *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956), and *Federal Power Commission* v. *Sierra Pacific Power Co.*, 350 U.S. 348, 355 (1956).[28]

This Court is all too familiar with predictions such as that advanced by petitioner that "the decision below [enforcing the Clayton Act] will cause grave injury to the economic life of the country" (PB 47). This is a familiar theme in antitrust cases. The answer is set out in *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533, 561-562 (1944). As the Court there said, quoting Justice Harlan, speaking for the Court in *Northern Securities Co.* v. *United States*, 193 U.S. 197, 351-352 (1904):

> "'. . . The suggestions of disaster to business have, we apprehend, their origin in the zeal of parties who are opposed to the policy underlying the act of Congress or are interested in the result of this particular case; at any rate, the suggestions imply that the court may and ought to refuse the enforcement of the provisions of the act if, in its judgment, Congress was not wise in prescribing as a rule by which the conduct of interstate and international commerce is to be governed, that every combination, whatever its form, in restraint of

[28] Petitioner is not aided by *Twin City Pipe Line Co.* v. *Harding Glass Co.*, 283 U.S. 353 (1931)—cited at pages 48, 49 of its brief. That case did not involve the Federal antitrust laws nor did the Court mention those laws. It arose under the state laws of Arkansas, which contained no counterpart of Section 3.

such commerce and the monopolizing or attempting to monopolize such commerce shall be illegal. These, plainly, are questions as to the policy of legislation which belong to another department, and this court has no function to supervise such legislation from the standpoint of wisdom or policy.'"

Contrary to petitioner's thesis, really grave injury to the national interest would come about if this Court should hold that a buyer may obtain the aid of the courts to compel performance of a contract confining a substantial amount of commerce to a single seller for 20 years. This would be a grant of an official patent to powerful enterprises like the public utilities, General Motors, the A&P, and hundreds of others to engross commerce for long periods, to remove large segments of trade from the competitive market, and, in effect, to make captive producers and distributors throughout our economy.[29]

The present contract is, in fact, an extreme example of the elimination of competition. It opposes the basic purpose of the antitrust laws to assure freedom of access by sellers and buyers to "outlets" and "sources" (*Fashion Originators' Guild of America, Inc.* v. *Federal Trade Commission*, 312 U.S. 457, 465 (1941)). As we have shown, the outlet from which the present contract forecloses competitors is not merely "substantial". It is huge. It engrosses the coal business of an

[29] Even a patent monopolist is forbidden by the federal antitrust laws to market his invention on terms restricting the customer's use of competitive processes or goods. *National Lockwasher Co.* v. *George K. Garrett Co.*, 137 F. 2d 255 (3rd Cir. 1943); *McCullough* v. *Kammerer Corp.*, 166 F. 2d 759 (9th Cir. 1948), *cert. denied*, 335 U.S. 813 (1948); *Dole Refrigerating Co.* v. *Kold-Hold Mfg. Co.*, 185 F. 2d 809, 816-817 (6th Cir. 1950), *modifying and affirming* 86 F. Supp. 323 (E.D. Mich. 1949).

electric utility monopoly serving an area which is admittedly "over 1½ times as large as the state of Rhode Island [and] which contains 11 per cent of the population of Florida" (R. 63).

6. The purpose of Section 3 is to prevent contracts such as the contract at issue. Petitioner's resort to legislative history is neither relevant nor reliable.

We have submitted that the test of Section 3 and the decisions of this Court answer petitioner's arguments with completeness unusual in antitrust litigation. Faced with the words of the statute and the decisions of this Court, petitioner seeks an escape through the murky passage of the legislative debates.

As early as 1922, this Court, in a Section 3 requirements case, rejected resort to legislative history for purposes of determining the application of the Section, on the grounds that the statute is clear and the legislative history is extraneous and unsatisfactory. It held in *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U.S. 346, 357 (1922):

> "The Clayton Act sought to reach the agreements embraced within its sphere in their incipiency, and, in the section [Section 3] under consideration, to determine their legality by specific tests of its own, which declared illegal contracts of sale made upon the agreement or understanding that the purchaser shall not deal in the goods of a competitor or competitors of the seller, which 'may substantially lessen competition or tend to create a monopoly.'
>
> *Much is said in the briefs concerning the reports of committees concerned with the enactment of this legislation, but the words of the act are plain, and their meaning is apparent, without the necessity of*

resorting to the extraneous statements and often unsatisfactory aid of such reports".[30]

The wisdom of this rule becomes graphically apparent by a comparison of petitioner's brief with the actual record of the legislative proceedings relating to Section 3 of the Clayton Act. The miscellaneous variety of utterances, which petitioner refers to as "legislative history",[31] are directly contradicted, on every point, by other utterances of equal or greater dignity.[32]

As briefly as possible, we shall demonstrate this point—and incidentally, shall establish that if resort is had to material of this type, it supports each of our contentions in this case.

Petitioner contends that the "legislative history" shows that Congress was concerned with "attempts by powerful sellers to monopolize the market". By a self-serving selection of quotes, it seeks to convey the impression that the Congress intended to reach *only* preclusive arrangements imposed by "powerful sellers".

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[30] This is the general rule. See *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 618 (1944); see also *Caminetti* v. *United States*, 242 U.S. 470, 485, 490 (1917); *Wilbur* v. *United States*, 284 U.S. 231, 237 (1931).

[31] Even including a colloquy between a lawyer and a member of Congress serving on the House Judiciary Committee (PB 27).

[32] Petitioner refers to this Court's opinion in *Standard Oil Co. of California, supra*, as demonstrating that reference to legislative history is appropriate. But the contrast is striking. This Court's monumental opinion in *Standard of California* refers to legislative history, to support its clear reading of the text of the statute, in the correct and technical sense of that term: to the history of the text of the bills in the course of their passage, as disclosed by amendments and the explanations of the floor managers of the bill

The remarks of Congressman Floyd on this subject on May 23, 1914, are quoted with approval (PB 26). On May 28, 1914, Congressman Floyd made it clear that the Section would also outlaw such contracts if made by the "small man". In response to the expression of concern as to the consequences which would result from depriving the "independent, small manufacturer" of the opportunity to make exclusionary contracts, he said:

> "... suppose one [small manufacturer] does get in and gets an exclusive contract of some kind, then you have two monopolies, and you never get beyond monopoly. If you had three or four, they would all result in restrictive monopolies, and in the meantime the American public are denied many conveniences, and denied them by means which are tending all the time to build up monopoly." (51 Cong. Rec. 9402, May 28, 1914).

Senator Reed, also quoted by the petitioner (PB 26-27), recognized that the Section would be generally applicable. He said:

> "It has been urged that Section 4 [now Section 3] will stop the weak concerns from being able to compete with the great concerns. Mr. President, there is not a single practice that is prohibited by Section 4 that cannot be used by the great concern against the small concern with a thousand times more effect than it can ever be used by the small concern against the great concern." (51 Cong. Rec. 14270, August 26, 1914).

Congressman Webb, one of petitioner's favorite sources (PB 24-25), acknowledged that the Section might be irksome to "small concerns" but he foresaw net benefit to them. During the debates he was asked by Congressman Willis to comment on

> "... protests from small concerns [who] ... take this position, that the only way that they have been able to sell their product is by making exclusive trade agreements with agents in different cities of the United States" (51 Cong. Rec. 9072, May 23, 1914.)

Congressman Webb answered (*ibid.*):

> "I think the small concern which the gentleman mentions has been compelled to adopt that method by the very trusts that first adopted it. He is compelled to adopt it as a matter of self-defense. ..."[33]

Congressman Webb also emphasized that Section 3 was deliberately designed to reach any single contract covered by its language. He stated (51 Cong. Rec. 9406, May 28, 1914):

> "... One act, one contract, would not come within the meaning of the Sherman antitrust law, but a series of acts, *each one of which we condemn in this section*, would bring them within the terms of the Sherman Antitrust law, and *what we are trying to do is to forbid the various individual acts which irresistibly lead to monopoly.*"

The Committee Reports, to which petitioner also refers, shows the purpose to reach all types of individual agreements, "singly and in themselves", in their incipiency, and even if their effect is highly localized. The Senate Report declares (S. Rep. No. 698, 63rd Cong., 2d Sess., 1914, p. 1):

> "... Broadly stated, the bill, in its treatment of unlawful restraints and monopolies, seeks to pro-

[33] Moreover, during the debate on the Clayton Act, a proposed amendment to exempt small companies (capital less than $5,000,000) from Section 3 was rejected. See 51 Cong. Rec. 9388-9389 (May 28, 1914).

hibit and make unlawful certain trade practices which, as a rule, *singly*, and in *themselves*, are not covered by the Act of July 2, 1890, or other *existing* antitrust acts, and *thus, by making these practices illegal*, to arrest the creation of trusts, conspiracies, and monopolies *in their incipiency and before consummation.*"

The House Report states (H. Rep. No. 627, 63rd Cong., 2d Sess., 1914, p. 12):

"... What is the motive and purpose of the manufacturer making or entering into such exclusive contracts? It is undoubtedly his purpose to drive out competition and to establish a monopoly in the sale of his commodities *in that particular community or locality.*"

We shall not burden this Court further with discussion of this point. If any conclusion is to be drawn from the legislative proceedings, it is that they reenforce the comprehensive application of the Act, in conformity with its construction and application by this Court. Viewing the legislative history most favorably to petitioner, the controlling principle was stated by this Court in *Gemsco, Inc.* v. *Walling*, 324 U.S. 244, 260 (1945):

"... The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction. This is such a case."

If anything is clear from the specific words and the legislative background of Section 3, it is that Congress was concerned not only with protecting consumers and buyers from exclusionary restrictions, but also with preserving the equal opportunity of all vendors to

reach the market, free of exclusionary arrangements between any buyer and any seller. This intention, apparent on the face of Section 3, is nowhere mentioned by petitioner.[34]

C. THE COURTS WILL NOT ENFORCE THE PRESENT UNLAWFUL CONTRACT, AND THE SELLER MAY AVAIL ITSELF OF THE DEFENSE.

We believe that, as we have shown, every point made by the petitioner in defense of the present contract is opposed by direct adjudications of this Court in Section 3 cases. Petitioner's final point does not relate to the legality of the contract. It assumes a violation of Section 3. The contention is that petitioner is nevertheless entitled to a judgment declaring the contract to be valid and lawful, and enforcing it "according to its terms". This contention is based upon the assertion that the "sole purpose of Section 3 of the Clayton Act is the protection of buyers, as a class . . ." (PB 52). The unlawful conduct, petitioner asserts, is that of the seller alone, and the statutory violation is no defense against a buyer's action to compel performance of the contract (PB 52-59).

The mere assertion of petitioner's proposition discloses its fallacy. Petitioner is asking this Court to declare that a contract which violates § 3 is lawful. This is not an action to recover for goods sold and delivered, or to require a party to pay for benefits received by him. On petitioner's own hypothesis, it is asking this Court to command the seller to proceed, for twenty years, with the performance of an unlawful act.

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[34] Compare the holding in *Federal Trade Commission* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 546 (1960), that "an independent and important goal of Section 2 is to extend protection to competitors of the seller."

On page 58 of its brief, petitioner refers to this Court's opinion in *Kelly* v. *Kosuga*, 358 U.S. 516 (1959), and by this reference demonstrates the paradox of its contention. Petitioner says, and we agree, that "the defense of illegality" should be narrowly confined; but petitioner also admits, as it must, that the defense is available in "those cases where 'the judgment of the Court would itself be enforcing the precise conduct made unlawful by the Act' " (PB 58).

Yet that is precisely the present case: Petitioner has filed an action for a declaration that the present contract "is a valid, lawful and enforceable contract and is binding upon the plaintiff and defendants, according to its terms" (R. 6). If this contract is unlawful, this is a prayer for enforcement of the precise, unlawful conduct. No coal has been delivered under the contract. The relief prayed by petitioner is an order requiring the seller to perform the exclusionary contract for 20 years. i.e., "the precise conduct made unlawful by the Act". The prohibited conduct is the contract itself, not a collateral agreement.[35]

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[35] This distinguishes the present case from *Bruce's Juices* v. *American Can Co.*, 330 U.S. 743 (1947), where the Court was careful to state (330 U.S. at 756):

> ". . . It is only when the Court goes outside of the dealings between plaintiff and defendant and it is proved that the same kind of cans were sold to others at different prices within a relevant period of time, amounting to a discrimination—a fact unnecessary to sustain the plaintiff's cause of action—that the basis of the defense asserted here appears. . . ."

The same circumstance differentiates *D.R. Wilder Mfg. Co.* v. *Corn Products Refining Co.*, 236 U.S. 165 (1915), *Connolly* v. *Union Sewer Pipe Co.*, 184 U.S. 540 (1902), and *A.B. Small Co.* v. *Lamborn & Co.*, 267 U.S. 248 (1925), cited at page 58, notes 34 and 35, of petitioner's brief. Compare the distinction of *Connolly* in *Continental Wall Paper Co.* v. *Louis Voight & Sons Co.*, 212 U.S. 227 et seq. (1909).

The application of the quoted precept of *Kelly* v. *Kosuga*—refusing judicial relief enforcing unlawful conduct—does not depend on the identity of the party raising the defense. This court has often refused to enforce an unlawful contract at the instance of the person whose conduct violated the law. E.g., *McMullen* v. *Hoffman*, 174 U.S. 639, 654 (1899); *Oscanyan* v. *Winchester Repeating Arms Co.*, 103 U.S. 261, 276 (1881). It has also refused to enforce an unlawful contract even if the person seeking to enforce it did not commit the prohibited act. *Continental Insurance Co.* v. *United States*, 259 U.S. 156, 171-173 (1922); *Texas & Pacific Railway Company* v. *S. O. Pottorff*, 291 U.S. 245, 260 (1934); *Weil* v. *Neary*, 278 U.S. 160 (1929); *Sage* v. *Hampe*, 235 U.S. 99 (1914); *St. Louis V. & T.H.R. Co.* v. *Terre Haute & I.R. Co.*, 145 U.S. 393 (1892); *Gibbs* v. *Consolidated Gas Co. of Baltimore City*, 130 U.S. 396 (1889).

This phase of petitioner's argument also mistakenly assumes that Section 3 was enacted solely for the buyer's protection. Its express language shows a purpose to protect "a competitor or competitors of the lessor or seller."[38] It is an enactment of public legislative policy which is not to be subordinated to the private interest of any particular buyer.

Particularly where acts of Congress are concerned, neither ordinary estoppel doctrine, nor alleged pri-

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[38] A competing seller successfully sued for violation of Section 3 in *Oxford Varnish Corp.* v. *Ault & Wiborg Corp.*, 83 F. 2d 764, 765 (6th Cir. 1936). "There is no precedent or reason for a rule *compelling* the seller to persist in illegal conduct at the risk of "civil suit by aggrieved competitors" (*United Cigar—Whelan Stores Corporation* v. *H. Weinrich Corp.*, 107 F. Supp. 89, 91 (S.D.N.Y. (Weinfeld, J.) 1952)).

vate bad faith, can preclude the assertion of defenses effectuating the public policy of the legislation. To quote Chief Justice Stone in *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U.S. 173, 177 (1942):

> "Local rules of estoppel which would fasten upon the public as well as the petitioner the burden of an agreement in violation of the Sherman Act must yield to the Act's declaration that such agreements are unlawful, and to the public policy of the Act which in the public interest precludes the enforcement of such unlawful agreements . . . ."

As he further said in *Scott Paper Co.* v. *Marcalus Mfg. Co.*, 326 U.S. 249, 257 (1945):

> ". . . The interest in private good faith is not a universal touchstone which can be made the means of sacrificing a public interest secured by an appropriate exercise of the legislative power."

The rule was stated as follows in *W. R. Grace & Co.* v. *Civil Aeronautics Board*, 154 F. 2d 270, 283 (2d Cir., L. Hand, Swan and Frank JJ., 1946), *cert. dismissed*, 332 U.S. 827 (1947):

> "And even if the agreements when made were in violation of the antitrust laws, Grace would not be thereby estopped from asking to be relieved of them; a party to a contract violative of a statute cannot be estopped from repudiating it when such repudiation will further the very public interest which the statute was designed to protect."

The truth is, moreover, that the statute cannot sensibly be construed to make only the seller's act, but not the contract, illegal. Section 3 declares it "unlawful" to "make a sale or contract for sale" of the

prohibited type. It is a play on words to suggest that this language covers only the seller's act, as distinguished from the contract itself, and hence permits the buyer to enforce the contract. It takes two parties to make "a sale or contract for sale". The contract cannot be legal as to the buyer, but illegal as to the seller.

If the legislative history is material on this point, as petitioner says (PB 53), it supports the proposition that the Section makes the contract *unlawful*, and not merely voidable at the buyer's option. Congressman Floyd, one of petitioner's quoted experts, and a member of the House Judiciary Committee (PB 26), dealt at length with the effect of the change in Section 3 from a criminal to a civil prohibition. He repeatedly emphasized that the change made the "contract unlawful" (See 51 Cong. Rec. 16,317-16,319 October 8, 1914)). He analogized the effect of Section 3 to a

> "statute that declares that all gambling contracts are unlawful . . . . The contract is worthless" (51 Cong. Rec. at 16,318).

Addressing himself to "sections 2, 3 and 7" of the Clayton Act, he described the contracts they specify as "*void*" and further said they "declare that *every contract made* involving the things herein prohibited is unlawful" (51 Cong. Rec. at 16,319).

It is significant that the formula used in Section 3 appears throughout the Clayton Act. For example, Section 7 provides "that no corporation shall acquire" the stock or assets of another in certain circumstances. (38 Stat. 731, as amended 64 Stat. 1125; 15 U.S.C. § 18).

Under petitioner's argument, the selling company in an unlawful merger under Section 7 could never-

theless compel performance by the buyer, because the statute reads only that "no corporation shall acquire." If so, Youngstown Steel would be at liberty to enforce its merger agreement with Bethlehem notwithstanding the judicial determination that the agreement violated Section 7. *United States* v. *Bethlehem Steel Co.*, 168 F. Supp. 576 (S.D.N.Y. 1958). In a case now before the Court, G. R. Kinney Corp. could obtain a court decree compelling Brown Shoe Co. to buy Kinney's stock, even if it were found that the merger violates Section 7 of the Clayton Act. *Brown Shoe Co.* v. *United States*, No. 65, October Term, 1960.

Indeed, if it were supposed that a contract violating Section 3 could so far as antitrust is concerned, be enforced against the seller but not the buyer, the result would certainly be to create a new class of contracts unknown to our law—a contract binding upon one party but not the other. But obviously, such a "contract" would be void for lack of mutuality.

Apart from its error of principle, petitioner's thesis that the buyer can enforce the contract, despite the violation of Section 3, is patently unfair. Petitioner is really saying that it could have avoided the contract whenever a better offer came along, but the seller was nevertheless bound at petitioner's option. This contemplates a one-sided exception, in the buyer's favor, from the elementary contract principle requiring mutuality of obligation. Compare *Jarrett* v. *Pittsburgh Plate Glass Co.*, 131 F. 2d 674, 676 (5th Cir. 1942).

In the present situation, the unfairness of such a doctrine is palpable. On petitioner's thesis, the seller is bound to provide performance for the 20 year period of the contract, but the buyer, for example, could

terminate its performance after the first year. The injustice is accentuated by the fact that petitioner from the start had "information and notice" of the facts creating "the offending under the Anti-Trust Law" (*Continental Ins. Co.* v. *United States, supra*, 259 U.S. 156, 172 (1922)).

There is nothing to the contrary in *Beloit Culligan Soft Water Service, Inc.* v. *Culligan, Inc.*, 274 F. 2d 29 (7th Cir. 1959). The *Culligan* Court emphasized that the buyers there—unlike petitioner—were not asking the Court to enforce an unlawful contract. The Court enforced the contract "*after excision of the requirements provision*" (274 F. 2d at 34). It could do so because the seller had previously agreed to a provision of a Federal Trade Commission consent order which deleted the exclusionary provisions of its agreements (274 F. 2d at 31-32). This deletion was possible under the *Culligan* contracts because, unlike this one, each contained severability clauses preserving the balance of the contract in the event that any provision should be declared illegal (274 F. 2d at 31).[37]

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[37] The passage from *Corbin on Contracts* recited in *Culligan* (274 F. 2d at 35) was not intended by Professor Corbin to apply to contracts violating the antitrust laws (cf. PB 54-55). This is made clear by Professor Corbin's previous comments concerning the impact of the Sherman and Clayton Acts on contracts within their coverage. He states in this regard (6 *Corbin on Contracts* § 1399, at p. 553):

> ". . . Any agreement that is within the provisions of either Act is necessarily an unenforceable agreement."

And he adds with specific reference to Section 3 (*id.* at p. 554):

> ". . . Any contract for exclusive dealing is a deprivation of opportunity to competitors. Such a contract is illegal if it is shown that the deprivation effected by it 'may be' 'substantial' in amount."

D. THE CONTRACT IS INVALIDATED BY SECTIONS 1 AND 2 OF THE SHERMAN ACT.

Although the lower courts did not reach the Sherman Act questions, they may be considered here. *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 214 (1951). As we have shown, the present contract is unlawful and the complaint should be dismissed under Section 3 of the Clayton Act, without reference to the Sherman Act. The undisputed facts, however, clearly establish that the contract is violative of the Sherman Act, as well as the Clayton Act.

First, its 20 year term is indefensible by Sherman Act standards. *Federal Trade Commission* v. *Motion Picture Advertising Service Co.*, 344 U.S. 392 (1953); *United States* v. *Pullman Co.*, 50 F. Supp. 123, 129 (E.D. Pa. 1943), *aff'd*, 330 U.S. 806 (1947); *United States* v. *American Can Co.*, 87 F. Supp. 18, 31 (N.D. Cal. 1949). Next, considering the substantial size of the market preempted, and the undisputed evidence of the suppression of the opportunities of hundreds of willing competitors of the seller (pp. 31-32, *supra*), the contract embodies an unreasonable restraint within the meaning of the Sherman Act. In *International Salt*, *supra*, the Court held as follows that the Sherman Act, as well as Section 3 of the Clayton Act had been violated (332 U.S. at 396):

> "Not only is price-fixing unreasonable, *per se*, United States v. Socony-Vacuum Oil Co., 310 U.S. 150; United States v. Trenton Potteries Co., 273 U.S. 392, but also it is unreasonable, *per se*, to foreclose competitors from any substantial market. Fashion Originators Guild v. Federal Trade Commission, 114 F. 2d 80, affirmed, 312 U.S. 457."

Further, the monopoly which the contract created is prohibited by Section 2 of the Sherman Act. See,

e.g., *Indiana Farmer's Guide Publishing Co.* v. *Prairie Farmer Publishing Co.*, 293 U.S. 268, 279 (1934); *United States* v. *Yellow Cab Co.*, 332 U.S. 218, 225-227 (1947); *William Goldman Theatres, Inc.* v. *Loew's Inc.*, 150 F. 2d 738, 744 (3d Cir. 1945), *cert. denied*, 334 U.S. 811 (1948). To quote the *Goldman* case (150 F. 2d at 744):

> "We know of no authority which sanctions what would otherwise be an illegal monopoly simply because it operates in a single city or a particular part of a city and affects only a part of an industry involved. There is no such limitation on the effect of the antitrust laws."

E. CONCLUSION

For the foregoing reasons, the decisions below should be affirmed.

Respectfully submitted,

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Dated: October 6, 1960.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 87

TAMPA ELECTRIC COMPANY,
Petitioner,

v.

NASHVILLE COAL COMPANY, NASHVILLE COAL, INC. and WEST KENTUCKY COAL COMPANY,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Introductory

Respondents' brief conclusively confirms our contention that prior to the decisions below, no contract even remotely resembling the contract at bar has ever been held invalid on the ground that it violated Section 3 of the Clayton Act. For every case relied on by respondents involving an alleged violation of that Section—or, in a Sherman Act case, of the "policy" laid down by that Section—features all three of the elements which, in combination, constitute the anti-competitive practices Congress sought to prohibit

by adopting Section 3: (1) In every case the contract is either based on an express condition that the purchaser will not deal in the goods of the seller's competitors, or is so drawn as in fact to prevent the purchaser from dealing in such goods under any circumstances;* (2) in every case the seller enjoyed a position of economic leverage sufficient to enable it to impose the restrictive condition on the purchaser; (3) every case deals with a general practice whereby a powerful seller sought to obtain control of the market for its goods by preempting as many key outlets for those goods as possible through the use of such contracts. Moreover, in every case it was the seller alone who was forbidden to enforce the contract.

Since none of these elements is present in the case at bar, it follows that respondents have not cited a single authority which by its holding supports their contention that the contract at bar violates Section 3. Moreover, when the many quotations from the opinions of this Court and other courts on which respondents rely are read in the context of the facts to which the opinions relate, it will readily be seen that they are completely inapplicable to the case at bar. For in every instance, the quotations are predicated upon the existence of all three of these elements.

Particularly, such an examination will disclose that in every case from which such quotations are drawn, there was no question but that the contract either in terms or in effect precluded the purchaser from dealing with the

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* See, for example, *Standard Oil Co. of California* v. *United States*, 337 U. S. 293, 303-04 (1949) (hereinafter "*Standard Oil*"):

> "* * * a dealer who has entered into a requirements contract with Standard cannot consistently with that contract sell the petroleum products of a competitor of Standard's no matter how many pumps he has * * *."

seller's competitors, so that the only issue before the courts was whether the contract came within the qualifying clause—*i.e.*, whether the contract might "substantially lessen competition or tend to create a monopoly in any line of commerce" within the meaning of that clause.* Obviously, that question has no bearing on whether the contract is based upon a restrictive condition prohibited by the basic clause of the statute. Yet opinions dealing exclusively with the qualifying clause are repeatedly cited in support of respondents' contention that it is immaterial that the purchaser is free to deal in the goods of the seller's competitors, or that the seller had no such economic leverage as to enable it to impose an exclusive dealing condition on an unwilling purchaser.

While purporting to apply such quotations to the contract at bar, respondents' arguments in reality convert Section 3 into a law which would be unrecognizable either by the members of Congress who adopted it or by courts which have heretofore construed it. For under their theory, *any* contract for the sale of a substantial volume of goods would violate Section 3 even though the contract left the purchaser free to deal in the goods of

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* See, for example, the following statements by this Court in two of the cases principally relied on by respondents:

> "Obviously the contracts here at issue would be proscribed if §3 stopped short of the qualifying clause. * * * It is the qualifying clause, therefore, which must be construed." *Standard Oil*, 337 U. S. at 297-98.

> "The covenant, read in the light of the circumstances in which it was made, is one by which the purchaser agreed not to sell any other make of patterns while the contract was in force. The real question is: Does the contract of sale come within the third section of the Clayton Act because the covenant not to sell the patterns of others 'may be to substantially lessen competition or tend to create a monopoly'." *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346, 355 (1922) (hereinafter *"Standard Fashion"*).

the seller's competitors, was desired by the purchaser, and had no more effect upon the market for the goods of the seller's competitors than any sale to one of their many potential customers would have.

I

Respondents' sole attempt to meet the undeniable fact that the contract at bar does not preclude the purchaser from dealing in the goods of the seller's competitors is to quote from opinions dealing with the qualifying clause.

Although recognizing, as they must, that the instant contract covers only the fuel requirements of two units of Gannon Station, one of petitioner's three integrated power-producing plants, for a twenty-year period, and of such other units as might be constructed at Gannon as coal-burning units during the first ten years of the contract term, respondents still ask this Court to declare that the contract comes within the statutory prohibition against making a contract of sale based on a "condition, agreement, or understanding that the * * * purchaser * * * shall not use or deal in the goods * * * of a competitor or competitors of the * * * seller." But nearly every argument they advance in support of this contention is based on the provisions, or this Court's construction of the provisions, of the qualifying clause that a contract based on such a restrictive condition is only unlawful when its effect "may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

For example, in answer to our contention that petitioner is presently dealing in the goods of competitors of the seller by burning oil, concededly a competitor of coal, in its eleven oil-burning units, respondents contend that

"petitioner's use of oil in other facilities is irrelevant, since coal itself is a 'line of commerce'" (R. Br. p. 26).* In support of this contention, respondents state that "Section 3 forbids the foreclosure of 'a competitor or competitors of the lessor or seller . . . *in any line of commerce*'" (R. Br. p. 27) (Emphasis in original). This is a patent distortion of the language of the statute. The standard of illegality set forth in Section 3 is *not* that the contract shall preclude the purchaser from dealing with the seller's competitors "in any line of commerce." The standard of illegality is that the contract shall preclude the purchaser from dealing with the seller's competitors, period. The phrase "in any line of commerce" is found only in the qualifying clause. This provision of the statute is, of course, not even reached unless and until it is found that the contract in issue is based on the condition, agreement, or understanding prohibited by the basic clause.** Thus, even assuming that coal and oil are separate lines of commerce, which we deny,*** this conclusion is of no help whatsoever to respondents in their efforts to establish that

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* The following references will be used herein:
P. Br.—Petitioner's main brief in this Court.
R. Br.—Respondents' brief in this Court.
R.—Printed record.

** The legislative history shows that the qualifying clause was added to Section 3 solely to *exempt* from the operation of the statute insubstantial contracts falling within the basic clause, not to add to the scope of its coverage. (See pp. 15-16, *infra*.)

*** Decisions of this Court, particularly *United States* v. *E. I. duPont de Nemours & Co.*, 351 U. S. 377 (1956), clearly establish the doctrine that the "line of commerce" is boiler fuels as a whole and not simply coal or oil, where such fuels are "reasonably interchangeable by consumers for the same purpose" (351 U. S. at 395). See also *American Crystal Sugar Co.* v. *Cuban American S. Co.*, 259 F.2d 524, 529 (2d Cir. 1958). We respectfully refer to the analysis of such cases in the dissenting opinion of Judge Weick below (R. 83-87).

this contract contains "a condition, agreement, or understanding that the * * * purchaser * * * shall not use or deal in the goods * * * of a competitor or competitors of the * * * seller."

Similarly, respondents seek to meet the incontrovertible fact that under the contract petitioner is free to burn coal purchased from their competitors in any generating unit not expressly covered by the contract, with the argument that "The contract covers *all* of petitioner's existing requirements of coal, for a 20 year period. The contract totally excludes, for 20 years, any competitor *from this huge market for coal,* which petitioner itself estimated would rise to 2,250,000 tons per year" (R. Br. p. 18).* Thus again, respondents seek to show that the contract comes within the basic prohibitory clause of Section 3 by showing that, according to them, the contract comes within the "substantiality" provision of the qualifying clause. The only authorities cited for this surprising proposition are the two decisions below in the instant case. We respectfully submit that those courts were led into error when they were persuaded to accept respondents' contention that the contract at bar is based on the condition that the purchaser will not deal in the goods of the seller's competitors because the amount of coal involved is "substantial."

Respondents also argue, as did the courts below, that the contract violates the provision against exclusive dealing because "there is nothing to indicate any planned or probable conversion of oil burning units into coal burning units or construction of coal burning units not covered

* Emphasis added here and throughout this brief unless otherwise indicated.

by the contract" (R. Br. p. 18). This is an obvious *non sequitur*. A contract under which the purchaser has the legal right to deal in the goods of the seller's competitors cannot be converted into a contract prohibiting such dealing by proof that the purchaser is not availing himself of that right.

Moreover, this proposition is contradicted by the record. As we pointed out in our main brief, during the pendency of this action Peabody Coal Company, a leading competitor of respondents, made an offer to supply coal for two of petitioner's oil-burning units if petitioner would convert them to coal.* This offer was rejected by petitioner solely because petitioner's oil supplier lowered its price to meet the threatened competition (P. Br. pp. 14-15). Manifestly, at any time one of respondents' competitors offers to sell coal to petitioner at a price and for a term of years which will make it economically advantageous for petitioner to convert its oil-burning units to coal, petitioner will accept that offer. It is the unhindered play of free competition, and not any restrictive provision of this contract, which is responsible for the fact that petitioner is not now purchasing coal from respondents' competitors.**

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* There is absolutely no basis in the record for respondents' insinuations that petitioner "procured" the Peabody offer "after commencement of the litigation," presumably to bolster its legal position (R. Br. p. 18). On the contrary, the record shows that a proposed contract was mailed by the Vice President of Peabody to petitioner's Mechanical Engineer as a basis of discussion and negotiation (R. 33).

** It is also worthy of note that petitioner has recently announced plans to construct a new coal-burning power plant in addition to Gannon which is expected to begin actual operation in the late 1960's. See *Public Utilities Fortnightly*, September 1, 1960, p. 19. The instant contract will certainly not preclude petitioner from purchasing its coal requirements for that plant from respondents' competitors.

Respondents also seek to meet our contention that the contract at bar cannot violate the basic prohibitory clause of Section 3 by citing cases involving contracts which by their very terms were based on unlawful exclusive dealing conditions. For example, respondents quote a truncated excerpt from this Court's opinion in *Standard Fashion*, where the Court invalidated a contract which, like some 10,000 other contracts made with other retailers, provided that no other make of dress patterns could be sold "on the premises" (R. Br. p. 20). That this decision lends no support to respondents' contention that petitioner's right to use competitive fuels in other units is immaterial is immediately apparent when the portion of the opinion quoted in respondents' brief is read in context. The sentence immediately preceding the quoted portion reads as follows:

> "The contract required the purchaser not to deal in goods of competitors of the seller" (258 U. S. at 354).

Following the portion quoted by respondents, the Court concludes:

> "The covenant, read in the light of the circumstances in which it was made, is one by which the purchaser agreed not to sell any other make of patterns while the contract was in force" (258 U. S. at 355).

Obviously, no such agreement can be spelled out of the contract at bar.

Respondents further confuse the issue by citing cases which hold that a tying contract falls within the basic clause of Section 3, even though it appeared that the buyer could still use the goods of the seller's competitors if it obtained substitutes for the tying product from other suppliers (R. Br. pp. 20-21). The essence of a tying

contract is that the purchaser may use the tying product only on the condition that he will not use the goods of the seller's competitors in connection with that product. Thus, such a contract by *its express terms* is based on the restrictive condition declared unlawful by Section 3, and accordingly, is illegal *per se* (provided it comes within the qualifying clause). In contrast, nothing in Section 3 condemns contracts covering a defined portion of the buyer's requirements, and such an agreement comes within the scope of the statute only if, as in *Standard Oil,* it can be shown to be the equivalent of an express agreement not to deal in the goods of the seller's competitors. If, as in the instant case, the buyer is free to and does in fact deal with the seller's competitors, the inapplicability of the Clayton Act is readily apparent.

Nevertheless, respondents argue that "The principle of these [tying] cases is applicable to requirements contracts. This Court has held in *Standard Oil Co. of California, supra,* that no distinction is to be drawn in the tests to be applied under Section 3 between tying and requirements cases" (R. Br. pp. 21-22).

Here again, for the third time, respondents are attempting to prove that the contract at bar is the equivalent of a contract based on an exclusive dealing condition by quoting from an opinion dealing with the qualifying clause. An examination of this Court's opinion in *Standard Oil* to which respondents refer (337 U. S. at 305-08) will make it abundantly clear that the "tests" to which the Court was there referring were the tests established by prior decisions for determining whether the effect of a tying contract may be to "substantially lessen competition or tend to create a monopoly". The fact that this Court considered these tests relevant in determining whether a particular contract meets the provisions of that clause, regardless of whether it is a tying contract or a full require-

ments contract, obviously has no bearing on whether or not the contract in question is based upon an unlawful exclusive dealing condition.

The inevitable result of respondents' contentions is to bring within the reach of Section 3 every substantial contract for the sale of a fixed quantity of goods. For any such contract can be said to be based on the unlawful condition that the purchaser will not use the goods of the seller's competitors to the extent of the amounts covered by the contract in question. It cannot be denied that the instant contract "forecloses" competitors no more than a contract to supply annually, for a 20 year period, "X" tons for each of the first two units of Gannon Station, as well as such other coal-burning units as might be constructed at Gannon during the first ten years of the contract term. Moreover, as we pointed out in our main brief, on the basis of present operating conditions, the amount of tons represented by "X" can easily be computed (P. Br. pp. 18-19).

Respondents present no tenable answer to our contention that the contract at bar cannot come within the purview of Section 3, since it does not prevent the purchaser from dealing in the goods of the seller's competitors.

POINT II

Respondents also attempt to meet the conceded fact that the seller under the contract at bar had no such economic leverage as to enable it to impose a restrictive condition on the purchaser by quoting from opinions dealing with the qualifying clause.

In an effort to meet our contention that a contract cannot violate Section 3 when the seller had no such economic leverage as to enable it to impose any "requirements" provision on the buyer, respondents rely principally upon the proposition that in *Standard Oil* "the Court expressly recognized that the seller did not have a dominant position in the market" (R. Br. p. 37).

We submit that once more, respondents are seeking to apply this Court's observations as to the qualifying clause in support of their contention that the contract violates the prohibition against exclusive dealing conditions. As we read the opinion, the reference to Standard's lack of market dominance was made only in relation to the Court's consideration of the qualifying clause. The Court observed that several prior cases had "regarded domination of the market as sufficient in itself to support the inference that competition had been or probably would be lessened" (337 U. S. at 301). The Court then noted that that test was inapplicable to the case before it since "Standard's share of the retail market for gasoline • • • is hardly large enough to conclude as a matter of law that it occupies a dominant position • • •" (337 U. S. at 302). The Court concluded, however, "that the qualifying clause of §3 is [also] satisfied by proof that competition has been foreclosed in a substantial share of the line of commerce affected" (337 U. S. at 314). In other words, under this

Court's decision in *Standard Oil*, the "test" of substantiality can be met either by proving that the seller dominates the market or by showing that "the affected proportion of • • • sales • • • is substantial" (337 U. S. at 314).

All of this has nothing to do with our contention regarding the necessity of economic leverage by the seller in determining whether the contract is based on the condition that the purchaser will not deal in the goods of the seller's competitors. On that issue, it is plain from Mr. Justice Frankfurter's dissenting opinion in *Federal Trade Commission* v. *Motion Picture Advertising Service Co.*, 344 U. S. 392, 402 (1953), that *Standard Oil* supports, rather than refutes, our contention:

> "The obvious bargaining power of the seller [in *Standard Oil*] *vis-a-vis* the retailer does not, so far as we are advised, have a parallel here. • • • In any event, in the *Standard Oil* case we recognized the discrepancy in bargaining power and pointed out that the retailers might still insist on exclusive contracts if they wanted."

Respondents also seek comfort from the portion of this Court's opinion in *Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 594 (1953), in which the Court was drawing a distinction between the proof required in order to invalidate a tying contract under the Sherman Act and the proof required in order to invalidate such a contract under Section 3 of the Clayton Act. Respondents quote the Court as saying that a contract comes within the Clayton Act either "[w]hen the seller enjoys a monopolistic position in the market for the 'tying' product, *or* if a substantial volume of commerce in the 'tied' product is restrained" (R. Br. p. 38). But once more respondents quote a portion of an opinion of this Court out of context.

The entire sentence, from which respondents have quoted only a part, reads as follows:

> "From the 'tying' cases a perceptible pattern of illegality emerges: When the seller enjoys a monopolistic position in the market for the 'tying' product, *or* if a substantial volume of commerce in the 'tied' product is restrained, a tying arrangement violates the narrower standards expressed in §3 of the Clayton Act *because from either factor the requisite potential lessening of competition is inferred*" (345 U. S. at 608-09) (First emphasis in original).

It seems to us that here Mr. Justice Clark, the author of the opinion, was merely reaffirming the conclusion reached in *Standard Oil*, to which we have just referred: That the qualifying clause of Section 3 was met by either test. In other words, for the fifth time respondents are attempting to establish that the contract at bar comes within the basic prohibition of Section 3 by reliance on a quotation dealing exclusively with the qualifying clause.

That Mr. Justice Clark was fully aware that economic leverage by a seller sufficient to enable him to impose the restrictive condition on the buyer was an essential element in any case involving such a condition is apparent from the following passages in his opinion in *Times-Picayune*: "By conditioning his sale of one commodity on the purchase of another, *a seller coerces the abdication of buyers' independent judgment* as to the 'tied' product's merits and insulates it from the competitive stresses of the open market" (345 U. S. at 605). And again: "The essence of illegality in tying agreements is the wielding of monopolistic leverage • • •" (345 U. S. at 611).

Respondents also argue that "as a practical matter" Section 3 should be as applicable to requirements contracts imposed on sellers by buyers, as *vice versa*

(R. Br. pp. 39-41). Particularly, they argue earnestly that coal producers in the "depressed coal industry" are or could be seriously injured by the imposition upon them of requirements contracts by powerful consumers of coal. If this is so, we suggest that they should request Congress to enact a new law providing that "It shall be unlawful for any person to purchase or contract for the purchase of all his requirements of a commodity from one seller." But that is not the kind of transaction which Section 3 was either designed or intended to prohibit. Nor do we believe the struggling coal producers would welcome such a statute.

We submit that Mr. Justice Black's observation in *Northern Pacific Railway Co.* v. *United States*, 356 U. S. 1, 6 (1958) that "Of course where the seller has no control or dominance over the tying product so that it does not represent an effectual weapon to pressure buyers into taking the tied item any restraint attributable to such tying arrangements would obviously be insignificant at most" is just as applicable to a requirements contract as to a tying contract, and regardless of whether it is attacked under the Sherman Act or the Clayton Act. Congress never intended to outlaw a contract whereby a consumer voluntarily contracted for the supply of a part of its requirements from a single supplier, and there is no reason why it should have.

POINT III

There is nothing in the legislative history of the Act to support respondents' contention that the statute was intended to reach a contract such as that at bar.

Respondents attempt to rebut our recitation of the legislative history of Section 3, which conclusively demon-

strates that the Act was not intended to apply to the instant contract, by asserting that this history shows "that the Section would also outlaw such [exclusive dealing] contracts if made by the 'small man'" (R. Br. p. 51). We have no quarrel with this proposition, for we do not deny that a small concern, by virtue of the control of a particularly desirable product or patent, might well be in a position to impose restrictive conditions upon its customers, and thus lessen competition or tend to create a monopoly. However, as Congressman Webb summarized the purpose of Section 3:

> "[The Section] prevents the manufacturer [whether large or small] from going to a little or big merchant and selling goods to him *on condition that that merchant shall sell only his goods and not sell the goods of any competitor* • • •" [I]t is a long step toward unfettering the little business man all over the country • • •." 51 Cong. Rec. 9407 (May 28, 1914).

But in any event, the various references to the plight of the "small man" contained in the legislative history quoted by respondents were made with regard to the House version of the bill, which flatly declared it to be a penal offense for a seller to make a sale or contract for sale upon the specified unlawful condition (see P. Br. p. 23). The Senate refused to support so drastic a statute because of the belief that "newcomers or small business enterprises in a particular line of commerce • • • could effectively compete with established interests only if these devices [of exclusive dealing] were available to them." *Dictograph Products, Inc.* v. *Federal Trade Commission*, 217 F. 2d 821, 827 (2d Cir. 1954), *cert. denied*, 349 U. S. 940 (1955); see 51 Cong. Rec. 14094, 14098, 14208, 14253, 14267 (1914); 65 Harv. L. Rev. 913, 934 (1952).

As a compromise between the House and Senate views, the qualifying clause was added in conference for the very purpose of protecting small dealers in minor transactions from too harsh an enforcement of the Act.* As Senator Walsh, one of the conferees, pointed out in explaining the purpose of the qualifying clause:

> "• • • it was found no easy task to frame a statute which would reach the case of a plundering monopolist which would not only not hamper many legitimate transactions but not be oppressive to a struggling industry contending for trade against a competitor enjoying a practical monopoly or one long established and supported by unlimited capital" (51 Cong. Rec. 16145).

There is nothing in the legislative history of Section 3, as quoted by respondents or as otherwise exists, which in any way contradicts our position that Congress did not intend to outlaw a contract to supply part of a public utility's fuel requirements, which was entered into on the basis of sound business considerations rather than any suggestion of economic coercion on the part of the seller.

Similarly, respondents assert that in enacting Section 3, "Congress was concerned not only with protecting consumers and buyers from exclusionary restrictions, but also with preserving the equal opportunity of all vendors to reach the market, free of exclusionary arrangements between any buyer and any seller" (R. Br. pp. 53-54). Clearly, when a buyer is compelled by a seller enjoying a position of economic leverage to enter into an exclusive dealing arrangement, economic injury may be inflicted not only on the buyer but also on competitors of the seller,

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* See S. Doc. No. 585, 63rd Cong., 2d Sess. (1914); H. R. Rep. No. 1168, 63rd Cong., 2d Sess. (1914) (Conference Committee Report); *Standard Oil*, 337 U. S. at 312.

from whom the buyer might wish to purchase some part of its needs were it not forced to deal with one seller exclusively. However, these factors are not present, and thus Section 3 is not offended, when a purchaser for sound business reasons *voluntarily elects* to buy from one supplier. It was not the intent of Section 3 to force a purchaser to sprinkle his business among a large number of suppliers if he did not desire or it was not economically feasible for him to do so. Rather, Section 3 was designed to "give the people *the right of choice* as to what articles of merchandise they will use,"* a right which petitioner here exercised by voluntarily entering into the supply arrangement which respondents ask this Court to invalidate.

Apparently, respondents are asking this Court to promote a "share the business" philosophy which, whatever its merits, has not yet been adopted by Congress.

POINT IV

Respondents' argument in support of their contention that the contract at bar comes within the qualifying clause is based on a plainly untenable concept of the market affected.

After devoting considerable space to the proposition that a part of the fuel requirements of a single relatively small electric utility constitutes a "huge market" for the sale of coal (R. Br. p. 18), and dwelling at length on the dollar value and tonnage of those requirements (R. Br. pp. 32-35), respondents finally turn to the only relevant factor in this area of their case: the potential effect of the contract on the seller's competitors in the coal industry (R. Br. pp. 35-36). On this issue, as this Court pointed

* 51 Cong. Rec. 9554 (June 1, 1914).

out in respondents' favorite authority, *Standard Oil*, "quantitative substantiality" alone is not enough:

> "Although the effect on competition will be quantitatively the same if a given volume of the industry's business is assumed to be covered, whether or not the affected sources of supply are those of the industry as a whole or only those of a particular region, *a purely quantitative measure of this effect is inadequate* because the narrower the area of competition, the greater the comparative effect on the area's competitors. *Since it is the preservation of competition which is at stake, the significant proportion of coverage is that within the area of effective competition*" (337 U. S. at 299-300, n. 5).

As this Court later stated the same proposition, "substantiality can be determined only in terms of the market affected" (*United States* v. *E. I. du Pont de Nemours & Co.*, 353 U. S. 586, 593 (1957)).

In a patent attempt to enlarge the "comparative effect" of this contract "on the area's competitors," respondents blandly assert that "the market in which this preclusive contract operates and from which it excludes 'a competitor or competitors of . . . the seller'" is to be measured by "the coal sold by all suppliers in Florida and Georgia" (R. Br. p. 36)*. This proposition is based upon two very obvious fallacies.

In the first place, it must be obvious that the "area of effective competition" or "market affected" is the area within which the seller and its competitors can sell their goods, and which any coal purchaser in Florida can, "as

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* Apparently, respondents' sole reason for including Georgia is that so little coal was sold in Florida prior to the construction of the Gannon plant that the available figures published by the Bureau of Mines combine the two states (R. Br. p. 35, n. 18).

a practical matter, turn to" for its supplies (*Standard Oil*, 337 U. S. at 299, n. 5). But here it is expressly conceded that petitioner, which was to purchase coal from mines in western Kentucky under the instant contract (R. 5), could turn to "a host of sellers of coal other than the contracting party" located in coal-producing states east of the Mississippi River (R. Br. p. 31). Moreover, we think that the Court can take judicial notice of the fact that suppliers in that area, *i.e.*, respondents and their competitors, can and do sell coal in almost every portion of the United States east of the Rocky Mountains, if not beyond. Specifically, the 700 producers which respondents have admitted are able to sell coal to petitioner (R. Br. pp. 6, 9-10, 31) annually market an amount of coal one hundred times greater than the *maximum* tonnage to be sold in any year under the instant contract (P. Br. pp. 41-42). Thus it is absurd to talk about Florida as constituting the "market affected" by the contract at bar.*

Secondly, we would point out the utter fallacy of measuring the "area of effective competition", even if it could be limited to Florida, by the amount of coal now being sold in that state. The "coal market in Florida" (R. Br. p. 35) available to respondents' competitors is not the small portion in which coal has already gained a foothold by virtue of the instant contract, but the vast market represented by all fuel consumers in Florida. For now that

* Respondents refer to the fact that the "area of effective competition" in *Standard Oil* was limited to the "Western area" consisting of only seven states (R. Br. p. 36). But the market was so defined because that was the area in which Standard had its refineries and sold its petroleum products (337 U. S. at 295). Respondents market their coal in innumerable states besides Florida and Georgia, and *Standard Oil* conclusively demonstrates that the relevant market embraces all such states.

this contract has broken into oil's monopoly by demonstrating that coal can effectively compete with oil for the Florida boiler fuel business, the whole of that state has been opened to any of respondents' competitors who can successfully meet that competition. Thus, instead of "foreclosing" the "huge market" represented by this single power plant (which is not a market, although, like any other power plant, it concededly burns a lot of coal), this contract has opened up a market probably twenty times as "huge" to respondents' competitors, even in the small segment of the true market area which respondents consider relevant.* Moreover, under respondents' theory Section 3 would outlaw any contract which introduced a new commodity into an area where it had never been sold before. For at the time such a contract is entered into, the seller would have preempted 100% of the market for the new commodity in that area.

We think it is plain from the foregoing that the contract at bar does not and could not "substantially lessen competition or tend to create a monopoly in any line of commerce". But we would point out that none of respondents' attempts to bring the contract within that clause would even be relevant, if it were recognized that Section 3 was never intended to reach a contract whereby a single consumer arranges for the supply of his requirements from a single supplier (see P. Br. pp. 29-30).

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* Respondents claim that the instant contract should be held illegal because "of the suppression of the opportunities of hundreds of willing competitors of the seller" (R. Br. p. 61).

POINT V

Respondents fail to show why they should be permitted to assert their own wrongdoing under Section 3 to repudiate a contract petitioner wishes to enforce.

Throughout their brief respondents contend that "if petitioner were granted relief, the 'judgment of the Court would itself be enforcing the precise conduct made unlawful by the [Clayton] Act' (*Kelly* v. *Kosuga*, 358 U. S. 516, 520 (1959)). That conduct is the performance of a contract foreclosing all competitors of the seller from any opportunity to supply the buyer's coal requirements for a period of 20 years" (R. Br. pp. 7, 15; see also R. Br. pp. 54-60).

But Section 3 does not declare any contract made in violation of its provisions to be unlawful or unenforceable. As this Court has repeatedly held in a long line of cases culminating in *Kelly* v. *Kosuga*, *supra*, "the Sherman Act's express remedies could not be added to judicially by including the avoidance of private contracts as a sanction" (358 U. S. at 519). Where a statute does not in terms invalidate a contract, the courts will only hold it unenforceable under very limited conditions. As Professor Williston states the rule:

> "It is commonly said that illegal bargains are void. This statement, however, is clearly not strictly accurate. • • • When relief is denied it is either because the plaintiff is a wrongdoer, and such a person the law does not aid, or, in exceptional cases, because the transaction is declared absolutely void by the law." 5 Williston, *Contracts* § 1630 (Rev. ed. 1937).

There is nothing inherently illegal about the contract at bar so far as petitioner is concerned. It is not unlawful for a buyer to elect to purchase his requirements from a single seller; even respondents do not contend that petitioner has violated Section 3 by making this contract. Nor is it unlawful for the seller to furnish those requirements at the agreed price, if the buyer so requests. If any illegality could be attributed to this contract, it would be the act of the seller in making and enforcing a contract containing the requirements provision. Thus it would be the seller, and the seller alone, who would be guilty of a wrongful act, if Section 3 could be said to have been violated.

While of course the seller will not be judicially permitted to enforce a condition prohibited by Section 3 against an unwilling purchaser, it does not follow that the seller can also take advantage of his own wrong to escape his contractual obligations towards a purchaser who desires that the contract be carried out. Thus there is no merit to respondents' contentions that a judgment in favor of petitioner will in any way result in the judgment of the Court "enforcing the precise conduct made unlawful by the Act." On the contrary, it would seem to us that it is the judgment below, which, by recognizing respondents' unlawful act as a ground for permitting them to repudiate this contract, gives judicial sanction to "the precise conduct made unlawful by the [Clayton] Act."

Respondents' excerpts from the statement of Congressman Floyd, intended to show a Congressional purpose to "void" a contract made in violation of Section 3, and accordingly render it unenforceable by an innocent purchaser (R. Br. p. 58), distort the meaning of that Con-

gressmen's remarks. The point to which Congressman Floyd was addressing himself was that the effectiveness of Section 3 would not be curtailed by excising the criminal sanctions which had originally been inserted to enforce that Section, and by instead providing merely that "it shall be unlawful" to "make a sale or contract for sale • • •" (See P. Br. p. 53). Thus Congressman Floyd outlined the consequences which would follow when a contract is made "in violation of any of these provisions":

> "What is it worth? *The maker of that contract* cannot enforce it in any court of law or equity. Is that not a strong and efficient remedy when the *injured party is seeking his rights against the offending corporation?*" 51 Cong. Rec. 16318 (Oct. 8, 1914)

Similarly, he pointed out that:

> "There is nothing in [Section 3] *in favor of the corporation whose contracts are declared void,* nothing in favor of any corporation violating the provisions of [Section 3], when you declare that every contract made involving the things herein prohibited is unlawful." 51 Cong. Rec. 16319 (Oct. 8, 1914)

It is apparent that Congressman Floyd was contending only that a contract made by a seller in violation of Section 3 would create no rights in the seller as the party violating that Section. Indeed, according to Congressman Floyd, the Section was enacted as an "advantage" to "the man who has been oppressed and is being oppressed by these corporations", *i.e.*, buyers whom Congress believed were being victimized by powerful sellers. (51 Cong. Rec. 16319 (Oct. 8, 1914))

Respondents also contend that to hold this contract enforceable by the purchaser, although not enforceable by a wrongdoing seller, will "create a new class of contracts unknown to our law—a contract binding upon one party but not the other. But obviously, such a 'contract' would be void for lack of mutuality" (R. Br. p. 59).

Surely counsel are aware of the many cases holding that a contract obtained by fraud is enforceable against the wrongdoer, but not enforceable by him against or over the opposition of the party (here the buyer) for whose benefit the law declares the act of the wrongdoer unlawful. The same principle is of course applied to contracts voidable by an infant as a party protected by the law, even though the other contracting party may be held to the contract if the infant so elects.

Indeed, the type of contract which respondents claim is "unknown to our law" was expressly established by this Court in the case of *A. C. Frost & Co.* v. *Coeur D'Alene Mines Corp.*, 312 U. S. 38 (1941). Plaintiff here sued to enforce an option which its assignor had received from defendant to purchase shares of defendant's treasury stock at a specified price. The defense was that the option contract was entered into by defendant in violation of the Securities Act of 1933, as the treasury stock to be sold thereunder was never registered under said Act, and accordingly the contract could not be enforced by the plaintiff. Although this Court assumed that a public offering of the optioned stock had taken place and thus registration was required, it unanimously reversed the court below and held the contract enforceable by the purchaser. The Court pointed out:

> "*No provision of the Act declares that* in the absence of registration, *contracts* in contemplation of or having relation to a public offering *shall be void*" (312 U. S. at 41).

Since "the clear legislative purpose [of the Securities Act] was *protection of innocent purchasers* of securities", the Court held that to deny plaintiff the right to enforce the contract "would probably seriously hinder rather than aid the real purpose of the statute" (312 U. S. at 43).

Similarly, "no provision of [Section 3] declares that • • • contracts • • • shall be void"* and as we have seen, the Section was adopted for the "protection of innocent purchasers."** Accordingly, the right of petitioner to enforce the instant contract is readily apparent. Moreover, it is clear from the *Frost* case that the plea of "lack of mutuality" cannot here be raised to defeat petitioner's claim. For even though, under *Frost*, a purchaser as an innocent party can enforce a contract to sell unregistered stock, clearly a seller who violated the law by entering into such a contract could *not* enforce it against a protesting purchaser. *Kaiser-Frazer Corp.* v. *Otis & Co.*, 195 F. 2d 838, 843-44 (2d Cir. 1952), *cert. denied*, 344 U. S. 856 (1952); *Doherty* v. *Bartlett*, 81 F. 2d 920 (1st Cir. 1936), *cert. denied*, 298 U. S. 676 (1936); 6 Corbin, *Contracts* § 1514, p. 978 (1951). Thus the *Frost* case shatters respondents' plea that "the contract cannot be legal as to the buyer, but illegal as to the seller" (R. Br. p. 58).

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* As stated in *United States* v. *United Shoe Machinery Co.*, 264 Fed. 138, 171 (E.D. Mo. 1920), *aff'd*, 258 U.S. 451 (1922): "Section 3 of the Clayton Act does not declare 'any contracts and leases [prohibited by that section] to be void' • • •."

** "In enacting [Section 3 of] the Clayton Act, Congress had in mind the protection of dealers [*i.e.* purchasers]": *Beloit Culligan Soft Water Service, Inc.* v. *Culligan, Inc.*, 274 F. 2d 29, 35 (7th Cir. 1959). See also *United States* v. *United Shoe Machinery Co.*, 234 Fed. 127, 139, 140 (E.D. Mo. 1916), *aff'd*, 258 U.S. 451 (1922): "[T]he object of the statute • • • was for the protection of the lessees and indirectly the public; Congress evidently presuming that the lessees accepted these leases under duress. • • • [T]he lessees are not indispensable nor necessary parties to this action, as the relief prayed in the bill, if granted, *can in no wise affect them or their rights*, except that it may relieve them of an onerous, and, as the complaint alleges, illegal, burden."

Finally, respondents simply confuse the issue by their contention that to permit the buyer to enforce the instant contract would mean that "the selling company in an unlawful merger under Section 7 could nevertheless compel performance by the buyer, because the statute reads only that 'no corporation shall acquire'" (R. Br. pp. 58-59). Section 7 was *not* enacted to protect selling companies from acquiring companies. Thus, in contrast to the instant case, judicial enforcement against an acquiring company of a merger agreement made in violation of Section 7 would *not* enable a party for whose benefit the law was enacted to hold a wrongdoer to his bargain.

POINT VI

The contract at bar does not violate the Sherman Act.

Respondents' contention that a contract to supply part of the fuel needs of a single public utility serving 11% of the population of a single state constitutes "an unreasonable restraint" or creates a "monopoly" within the meaning of the Sherman Act (R. Br. p. 61) is so preposterous as not to warrant serious consideration. As we understand respondents' argument, it is predicated upon the fact that this contract illegally precludes competitors of the seller from supplying petitioner with the coal purchased from respondents, and gives respondents a "monopoly" of petitioner's coal business to the extent of the tonnage furnished by them.* We do not believe that

* The correct test for determining unreasonable restraint was stated by this Court in *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 527 (1948):

> "In determining what constitutes unreasonable restraint, we do not think the dollar volume is in itself of compelling significance; we look rather to the percentage of business controlled the strength of the remaining competition, whether the action springs from business requirements or purpose to monopolize, the probable development of the industry, consumer demands, and other characteristics of the market."

this Court will permit the Sherman Act to wreck business by adopting respondents' logic, which would obviously invalidate every contract for the supply of a substantial quantity of goods.

CONCLUSION

The judgment of the United States Court of Appeals for the Sixth Circuit should be reversed and the case remanded to the United States District Court for the Middle District of Tennessee, with directions to grant petitioner's cross-motion for summary judgment and deny respondents' motion for summary judgment.

Respectfully submitted,

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December 13, 1960.

SUPREME COURT OF THE UNITED STATES

No. 87.—October Term, 1960.

Tampa Electric Company, Petitioner, v. Nashville Coal Company, et al.	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[February 27, 1961.]

Mr. Justice Clark delivered the opinion of the Court.

We granted certiorari to review a declaratory judgment holding illegal under § 3 of the Clayton Act [1] a requirements contract between the parties providing for the purchase by petitioner of all the coal it would require as boiler fuel at its Gannon Station in Tampa, Florida, over a 20-year period. 363 U. S. 836. Both the District Court, 168 F. Supp. 456, and the Court of Appeals, 276 F. 2d 766, Circuit Judge Weick dissenting, agreed with respondent that the contract fell within the proscription of § 3 and therefore was illegal and unenforceable. We cannot agree that the contract suffers the claimed anti-trust illegality [2] and, therefore, do not find it necessary to

[1] "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods . . . for use, consumption, or resale within the United States . . . on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods . . . of a competitor or competitors of the . . . seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce." 15 U. S. C. § 14.

[2] In addition to their claim under § 3 of the Clayton Act, respondents argue the contract is illegal under the Sherman Act, 15 U. S. C. §§ 1–2.

consider respondents' additional argument that such illegality is a defense to the action and a bar to enforceability.

The Facts.

Petitioner Tampa Electric Company is a public utility located in Tampa, Florida. It produces and sells electric energy to a service area, including the city, extending from Tampa Bay eastward 60 miles to the center of the State, and some 30 miles in width. As of 1954 petitioner operated two electrical generating plants comprising a total of 11 individual generating units, all of which consumed oil in their burners. In 1955 Tampa Electric decided to expand its facilities by the construction of an additional generating plant to be comprised ultimately of six generating units, and to be known as the "Francis J. Gannon Station." Although every electrical generating plant in peninsular Florida burned oil at that time, Tampa Electric decided to try coal as boiler fuel in the first two units constructed at the Gannon Station. Accordingly, it contracted with the respondents [3] to furnish the expected coal requirements for the units. The agreement, dated May 23, 1955, embraced Tampa Electric's "total requirements of fuel . . . for the operation of its first two units to be installed at the Gannon Station . . . not less than 225,000 tons of coal per unit per year," for a period of 20 years. The contract further provided that "if during the first 10 years of the term . . . the Buyer constructs additional units [at Gannon] in which coal is used as the fuel, it shall give the Seller notice thereof two years prior to the completion of such unit or units and upon completion of same the fuel requirements thereof shall be added to this

[3] The original contract was with Potter Towing Company, and by subsequent agreements with Tampa Electric responsibility thereunder was assumed by respondent West Kentucky Coal Company.

contract." It was understood and agreed, however, that "the Buyer has the option to be exercised two years prior to completion of said unit or units of determining whether coal or some other fuel shall be used in same." Tampa Electric had the further option of reducing, up to 15%, the amount of its coal purchases covered by the contract after giving six months' notice of an intention to use as fuel a by-product of any of its local customers. The minimum price was set at $6.40 per ton delivered, subject to an escalation clause based on labor cost and other factors. Deliveries were originally expected to begin in March 1957, for the first unit, and for the second unit at the completion of its construction.

In April 1957, soon before the first coal was actually to be delivered and after Tampa Electric, in order to equip its first two Gannon units for the use of coal, had expended some $3,000,000 more than the cost of constructing oil-burning units, and after respondents had expended approximately $7,500,000 readying itself to perform the contract, the latter advised petitioner that the contract was illegal under the antitrust laws, would therefore not be performed, and no coal would be delivered. This turn of events required Tampa Electric to look elsewhere for its coal requirements. The first unit at Gannon began operating August 1, 1957, using coal purchased on a temporary basis, but on December 23, 1957, a purchase order contract for the total coal requirements of the Gannon Station was made with Love and Amos Coal Company. It was for an indefinite period cancellable on 12 months' notice by either party, or immediately upon tender of performance by respondents under the contract sued upon here. The maximum price was $8.80 per ton, depending upon the freight rate. In its purchase order to the Love and Amos Company, Tampa estimated that its requirements at the Gannon Station would be 350,000 tons in

1958; 700,000 tons in 1959 and 1960; 1,000,000 tons in 1961; and would increase thereafter, as required, to "about 2,250,000 tons per year." The second unit at Gannon Station commenced operation 14 months after the first, *i. e.*, October 1958. Construction of a third unit, the coal for which was to have been provided under the original contract, was also begun.

The record indicates that the total consumption of coal in peninsular Florida, as of 1958, aside from Gannon Station, was approximately 700,000 tons annually. It further shows that there were some 700 coal suppliers in the producing area where respondents operated, and that Tampa Electric's anticipated maximum requirements at Gannon Station, *i. e.*, 2,250,000 tons annually, would approximate 1% of the total coal of the same type produced and marketed from respondents' producing area.

Petitioner brought this suit in the District Court pursuant to 28 U. S. C. § 2201, for a declaration that its contract with respondents was valid, and for enforcement according to its terms. In addition to its Clayton Act defense, respondents contended that the contract violated both §§ 1 and 2 of the Sherman Act which, it claimed, likewise precluded its enforcement. The District Court, however, granted respondents' motion for summary judgment on the sole ground that the undisputed facts, recited above, showed the contract to be a violation of § 3 of the Clayton Act. The Court of Appeals agreed. Neither court found it necessary to consider the applicability of the Sherman Act.

Decisions of District Court and Court of Appeals.

Both courts admitted that the contract "does not expressly contain the 'condition'" that Tampa Electric would not use or deal in the coal of respondents' competitors. Nonetheless, they reasoned, the "total requirements" provision had the same practical effect, for it

prevented Tampa Electric for a period of 20 years from buying coal from any other source for use at that station. Each court cast aside as "irrelevant" arguments citing the use of oil as boiler fuel by Tampa Electric at its other stations, and by other utilities in peninsular Florida because oil was not in fact used at Gannon Station, and the possibility of exercise by Tampa Electric of the option reserved to it to build oil-burning units at Gannon was too remote. Found to be equally remote was the possibility of Tampa's conversion of existing oil-burning units at its other stations to the use of coal which would not be covered by the contract with respondents. It followed, both courts found, that the "line of commerce" on which the restraint was to be tested was coal—not boiler fuels. Both courts compared the estimated coal tonnage as to which the contract pre-empted competition for 20 years, namely, 1,000,000 tons a year by 1961, with the previous annual consumption of peninsular Florida, 700,000 tons. Emphasizing that fact as well as the contract value of the coal covered by the 20-year term, *i. e.*, $128,000,000, they held that such volume was not "insignificant or insubstantial" and that the effect of the contract would "be to substantially lessen competition," in violation of the Act. Both courts were of the opinion that in view of the executory nature of the contract, judicial enforcement of any portion of it could not be granted without directing a violation of the Act itself, and enforcement was, therefore, denied.[4]

Application of § 3 of the Clayton Act.

In the almost half-century since Congress adopted the Clayton Act, this Court has been called upon 10 times.[5]

[4] Cf. *Kelly* v. *Kosuga*, 358 U. S. 516.

[5] For discussion of previous cases, see *Standard Oil Co.* v. *United States*, 337 U. S. 293, 300-305.

including the present, to pass upon questions arising under § 3. *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346 (1922), the first of the cases, held that the Act "sought to reach the agreements embraced within its sphere in their incipiency, and in the section under consideration to determine their legality by specific tests of its own. . . ." In sum, it was declared, § 3 condemned sales or agreements "where the effect of such sale or contract . . . would under the circumstances disclosed, probably lessen competition, or create an actual tendency to monopoly." At pp. 356–357. This was not to say, the Court emphasized, that the Act was intended to reach every "remote lessening" of competition—only those which were substantial—but the Court did not draw the line where "remote" ended and "substantial" began. There in evidence, however, was the fact that the activities of two-fifths of the nation's 52,000 pattern agencies were affected by the challenged device. Then, one week later, followed *United Shoe Machinery Corp.* v. *United States*, 258 U. S. 451 (1922), which held that even though a contract does "not contain specific agreements not to use the [goods] of a competitor," if "the practical effect . . . is to prevent such use," it comes within the condition of the section as to exclusivity. At p. 457. The Court also held, as it had in *Standard Fashion*, *supra*, that a finding of domination of the relevant market by the lessor or seller was sufficient to support the inference that competition had or would be substantially lessened by the contracts involved there. As of that time it seemed clear that if "the practical effect" of the contract was to prevent a lessee or buyer from using the products of a competitor of the lessor or seller and the contract would thereby probably substantially lessen competition in a line of commerce, it was proscribed. A quarter of a century later, in *International Salt Co.* v.

United States, 332 U. S. 392 (1947), the Court held, at least in tying cases, that the necessity of direct proof of the economic impact of such a contract was not necessary where it was established that "the volume of business affected" was not "insignificant or insubstantial" and that the effect was "to foreclose competitors from any substantial market." At p. 396. It was only two years later, in *Standard Oil Co.* v. *United States*, 337 U. S. 293 (1949), that the Court again considered § 3 and its application to exclusive supply or, as they are commonly known, requirements contracts. It held that such contracts are proscribed by § 3 if their practical effect is to prevent lessees or purchasers from using or dealing in the goods, etc., of a competitor or competitors of the lessor or seller and thereby "competition has been foreclosed in a substantial share of the line of commerce affected." At p. 314.

In practical application, even though a contract is found to be an exclusive dealing arrangement, it does not violate the section unless the court believes it probable that performance of the contract will foreclose competition in a substantial share of the line of commerce affected. Following the guidelines of earlier decisions, certain considerations must be taken. *First*, the line of commerce, *i. e.*, the type of goods, wares, or merchandise, etc., involved must be determined, where it is in controversy, on the basis of the facts peculiar to the case.[6] *Second*, the area of effective competition in the known line of commerce must be charted by careful selection of the market area in which the seller operates, and to which the purchaser can practicably turn for supplies. In short, the threatened foreclosure of competition must

[6] See *International Boxing Club* v. *United States*, 358 U. S. 242.

be in relation to the market affected. As was said in *Standard Oil Co.* v. *United States, supra:*

> "It is clear, of course, that the 'line of commerce' affected need not be nationwide, at least where the purchasers cannot, as a practical matter, turn to suppliers outside their own area. Although the effect on competition will be quantitatively the same if a given volume of the industry's business is assumed to be covered, whether or not the affected sources of supply are those of the industry as a whole or only those of a particular region, a purely quantitative measure of this effect is inadequate because the narrower the area of competition, the greater the comparative effect on the area's competitors. Since it is the preservation of competition which is at stake, the significant proportion of coverage is that within the area of effective competition." At p. 299, note 5.

In the *Standard Oil* case, the area of effective competition—the relevant market—was found to be where the seller and some 75 of its competitors sold petroleum products. Conveniently identified as the Western Area, it included Arizona, California, Idaho, Nevada, Oregon, Utah and Washington. Similarly, in *United States* v. *Columbia Steel Co.*, 334 U. S. 495 (1948), a § 1 Sherman Act case, this Court decided the relevant market to be the competitive area in which Consolidated marketed its products, *i. e.*, 11 Western States. The Court found Consolidated's share of the nationwide market for the relevant line of commerce, rolled steel products, to be less than ½ of 1%, an "insignificant fraction of the total market," at p. 508; and its share of the more narrow but only relevant market, 3%, was described as "a small part," at p. 511, not sufficient to injure any competitor of United States Steel in that area or elsewhere.

Third, and last, the competition foreclosed by the contract must be found to constitute a substantial share of the relevant market. That is to say, the opportunities for other traders to enter into or remain in that market must be significantly limited as was pointed out in *Standard Oil Co.* v. *United States, supra*. There the impact of the requirements contracts was studied in the setting of the large number of gasoline stations—5,937 or 16% of the retail outlets in the relevant market—and the large number of contracts, over 8,000, together with the great volume of products involved. This combination dictated a finding that "Standard's use of the contracts [created] just such a potential clog on competition as it was the purpose of § 3 to remove" where, as there, the affected proportion of retail sales was substantial. At p. 314. As we noted above, in *United States* v. *Columbia Steel Co., supra*, substantiality was judged on a comparative basis, *i. e.*, Consolidated's use of rolled steel was "a small part" when weighed against the total volume of that product in the relevant market.

To determine substantiality in a given case, it is necessary to weigh the probable effect of the contract on the relevant area of effective competition, taking into account the relative strength of the parties, the proportionate volume of commerce involved in relation to the total volume of commerce in the relevant market area, and the probable immediate and future effects which pre-emption of that share of the market might have on effective competition therein. It follows that a mere showing that the contract itself involves a substantial number of dollars is ordinarily of little consequence.

The Application of § 3 Here.

In applying these considerations to the facts of the case before us, it appears clear that both the Court of Appeals and the District Court have not given the required effect

to a controlling factor in the case—the relevant competitive market area. This omission, by itself, requires reversal, for, as we have pointed out, the relevant market is the prime factor in relation to which the ultimate question, whether the contract forecloses competition in a substantial share of the line of commerce involved, must be decided. For the purposes of this case, therefore, we need not decide two threshold questions pressed by Tampa Electric. They are whether the contract in fact satisfies the initial requirement of § 3, *i. e.*, whether it is truly an exclusive dealing one, and, secondly, whether the line of commerce is boiler fuels, including coal, oil and gas, rather than coal alone.[7] We, therefore, for the purposes of this case, assume, but do not decide, that the contract is an exclusive dealing arrangement within the compass of § 3, and that the line of commerce is bituminous coal.

Relevant Market of Effective Competition.

Neither the Court of Appeals nor the District Court considered in detail the question of the relevant market. They do seem, however, to have been satisfied with inquiring only as to competition within "Peninsular Florida." It was noted that the total consumption of peninsular Florida was 700,000 tons of coal per year, about equal to the estimated 1959 requirements of Tampa Elec-

[7] In support of these contentions petitioner urges us to consider that it remains free to convert existing oil-burning units at its other plants to coal-burning units, the fuel for which it would be free to purchase from any seller in the market; also that just as it is permitted to use oil at its other plants, so too, it may construct all future Gannon units as oil-burners; and that in any event it is free to draw a maximum of 15% of its Gannon fuel requirements from by-products of local customers. Petitioner further argues that its novel reliance upon coal in fact created new fuel competition in an area that theretofore relied almost exclusively upon oil and, to a lesser extent, upon natural gas.

tric. It was also pointed out that coal accounted for less than 6% of the fuel consumed in the entire State.* The District Court concluded that though the respondents were only one of 700 coal producers who could serve the same market, peninsular Florida, the contract for a period of 20 years excluded competitors from a substantial amount of trade. Respondents contend that the coal tonnage covered by the contract must be weighed against either the total consumption of coal in peninsular Florida, or all of Florida, or the Bituminous Coal Act area comprising peninsular Florida and the Georgia "finger," or, at most, all of Florida and Georgia. If the latter area were considered the relevant market, Tampa Electric's proposed requirements would be 18% of the tonnage sold therein. Tampa Electric says that both courts and respondents are in error, because the "700 coal producers who could serve" it, as recognized by the trial court and admitted by respondents, operated in the Appalachian coal area and that its contract requirements were less than 1% of the total marketed production of these producers; that the relevant effective area of competition was the area in which these producers operated, and in which they were willing to compete for the consumer potential.

We are persuaded that on the record in this case, neither peninsular Florida, nor the entire State of Florida, nor Florida and Georgia combined constituted the relevant market of effective competition. We do not believe that the pie will slice so thinly. By far the bulk of the overwhelming tonnage marketed from the same producing area as serves Tampa is sold outside of Georgia and Florida, and the producers were "eager" to sell more coal in

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* Oil and, to a lesser extent, natural gas are the primary fuels consumed in Florida.

those States.[9] While the relevant competitive market is not ordinarily susceptible to a "metes and bounds" definition, cf. *Times-Picayune Pub. Co.* v. *United States*, 345 U. S. 594, 611, it is of course the area in which respondents and the other 700 producers effectively compete. *Standard Oil Co.* v. *United States*, *supra*. The record shows that like the respondents, they sold bituminous coal "suitable for [Tampa's] requirements," mined in parts of Pennsylvania, Virginia, West Virginia, Kentucky, Tennessee, Alabama, Ohio and Illinois. We take notice of the fact that the approximate total bituminous coal (and lignite) product in the year 1954 from the districts in which these 700 producers are located was 359,289,000 tons, of which some 290,567,000 tons were sold on the open market.[10] Of the latter amount some 78,716,000 tons were sold to electric utilities.[11] We also note that in 1954 Florida and Georgia combined consumed at least 2,304,000 tons, 1,100,000 of which were used by electric utilities, and the sources of which were mines located in no less than seven States.[12] We take further notice that the production and marketing of bituminous coal (and lignite) from the same districts, and assumedly equally available to Tampa on a commercially feasible basis, is currently on a par with prior years.[13]

[9] Peabody Coal Company offered to supply petitioner with coal from its mines in western Kentucky, for use in the units at another of its Florida stations and that offer prompted a renegotiation of the price petitioner was paying for the oil then being consumed at that station.

[10] U. S. Bureau of the Census. I U. S. Census of Mineral Industries: 1954, Series: MI-12B, p. 4 (1957).

[11] *Id.*, at 12B-6.

[12] 1,569,000 tons from counties in West Virginia, Virginia, Kentucky, Tennessee and North Carolina; 412,000 tons from counties in Alabama, Georgia and Tennessee; the balance was produced in other counties in West Virginia, Virginia and western Kentucky. *Id.*, at 12B-10.

[13] United States Dept. of Interior, Bureau of Mines, II Minerals Yearbook (Fuels), 1959.

In point of statistical fact, coal consumption in the combined Florida-Georgia area has increased significantly since 1954. In 1959 more than 3,775,000 tons were there consumed, 2,913,000 being used by electric utilities including, presumably, the coal used by the petitioner.[14] The coal continued to come from at least seven States.[15] From these statistics it clearly appears that the proportionate volume of the total relevant coal product as to which the challenged contract pre-empted competition, less than 1%; is, conservatively speaking, quite insubstantial. A more accurate figure, even assuming pre-emption to the extent of the maximum anticipated total requirements, 2,250,000 tons a year, would be .77%.

Effect on Competition in the Relevant Market.

It may well be that in the context of antitrust legislation protracted requirements contracts are suspect, but they have not been declared illegal *per se*. Even though a single contract between single traders may fall within the initial broad proscription of the section, it must also suffer the qualifying disability, tendency to work a substantial—not remote—lessening of competition in the relevant competitive market. It is urged that the present contract pre-empts competition to the extent of purchases worth perhaps $128,000,000,[16] and that this "is,

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[14] United States Dept. of Interior, Bureau of Mines, Mineral Market Report, M. M. S. No. 3035, p. 23 (1960). These statistics were taken from sources cited by respondents.

[15] 1,787,000 tons from certain counties in West Virginia, Virginia, Kentucky, Tennessee and North Carolina; 1,321,000 tons from counties in Alabama, Georgia and elsewhere in Tennessee; 665,000 tons from the western Kentucky fields; 2,000 tons from other counties in West Virginia and Virginia. *Ibid.*

[16] In this connection we note incidentally that in *Appalachian Coals, Inc.*, v. *United States*, 288 U. S. 344, 369 (1933), cited by respondents, Chief Justice Hughes quoted testimony showing that in 1932 it was nothing those days "for one interest or one concern to buy several mil-

of course, not insignificant or insubstantial." While $128,000,000 is a considerable sum of money, even in these days, the dollar-volume, by itself, is not the test, as we have already pointed out.

The remaining determination, therefore, is whether the pre-emption of competition to the extent of the tonnage involved tends to substantially foreclose competition in the relevant coal market. We think not. That market sees an annual trade in excess of 250,000,000 tons of coal and over a billion dollars—multiplied by 20 years it runs into astronomical figures. There is here neither a seller with a dominant position in the market as in *Standard Fashions, supra;* nor myriad outlets with substantial sales volume, coupled with an industry-wide practice of relying upon exclusive contracts, as in *Standard Oil, supra;* nor a plainly restrictive tying arrangement as in *International Salt, supra.* On the contrary, we seem to have only that type of contract which "may well be of economic advantage to buyers as well as to sellers." *Standard Oil Co.* v. *United States, supra,* at p. 306. In the case of the buyer it "may assure supply" while on the part of the seller it "may make possible the substantial reduction of selling expenses, give protection against price fluctuations, and . . . offer the possibility of a predictable market." *Id.,* at 306–307. The 20-year period of the contract is singled out as the principal vice, but at least in the case of public utilities the assurance of a steady and ample

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lion tons of coal." At n. 7. The findings of the District Court showed that one utility consumed 2,485,000 tons of coal a year. Other concerns had requirements running from 30,000 to 250,000 tons while a textile manufacturer used 600,000 tons. At p. 370, n. 8. The Chief Justice also stated in his opinion that within 24 counties in Kentucky, Tennessee (in both of which respondents operate) and their competitive States of Virginia and West Virginia "there are over 1,620,000 acres of coal bearing land, containing approximately 9,000,000,000 net tons of recovable coal . . . ." At p. 369.

supply of fuel is necessary in the public interest. Otherwise consumers are left unprotected against service failures owing to shut-downs; and increasingly unjustified costs might result in more burdensome rate structures eventually to be reflected in the consumer's bill. The compelling validity of such considerations has been recognized fully in the natural gas public utility field. This is not to say that utilities are immunized from Clayton Act proscriptions, but merely that, in judging the term of a requirements contract in relation to the substantiality of the foreclosure of competition, particularized considerations of the parties' operations are not irrelevant. In weighing the various factors we have decided that in the competitive bituminous coal marketing area involved here the contract sued upon does not tend to foreclose a substantial volume of competition.

We need not discuss the respondents' further contention that the contract also violates § 1 and § 2 of the Sherman Act for if it does not fall within the broader proscription of § 3 of the Clayton Act it follows that it is not forbidden by those of the former. *Times-Picayune Pub. Co.* v. *United States, supra,* at pp. 608–609.

The judgment is reversed and the case remanded to the District Court for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that the District Court and the Court of Appeals correctly decided this case and would therefore affirm their judgments.